Supreme
F
D8 985 DEC 16 1998
OFFICE OF THE CLERK

No. 98-

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

LINCOLN HERBERT

Petitioner

v.

ROBERT J. REINSTEIN, DEAN
TEMPLE UNIVERSITY SCHOOL OF LAW
AND VICE PRESIDENT OF TEMPLE UNIVERSITY;
TEMPLE UNIVERSITY SCHOOL OF LAW;
&
TEMPLE UNIVERSITY

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD P. MYERS
(Counsel of Record)
PAUL, REICH & MYERS,
1608 Walnut St., Ste. 500
Philadelphia, PA 19103
(215) 735-9200

GLENN J. BROWN
PALISSERY & BROWN
246 West Broad St.
Quakertown, PA 18951
(215) 529-0920

MARTIN E. WOLF
Lindill Bldg.,Ste. 100
104 Victory Lane
Bel Air, MD 21014
(410) 893-3500

QUESTIONS PRESENTED

1. Can a civil rights action challenging an administrative decision accrue before the decision of the administrative tribunal is final?

2. May a state university disciplinary tribunal impose forced submission to psychiatry as a punishment for a student's "lying"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHAT GOVERNS CLAIM ACCRUAL DATES FOR CHALLENGES TO ADMINISTRATIVE DECISIONS: "FINALITY" OR "NOTICE" . . . . .

1. Introduction 8

2. This Court's Decision in *Ricks* 9

3. The D.C., Ninth, and Seventh Circuits Require Finality under *Ricks*. 12

4. The Second, Third, and Sixth Circuits Do Not Require Finality Under *Ricks* 16

5. The Present Case Would Be Decided Differently In Various Circuits 19

6. Adoption of The "Finality" Rule is Important to Sound Judicial Policy. . . 20

II. A STATE UNIVERSITY MAY NOT USE FORCED SUBMISSION TO PSYCHIATRY AS A DISCIPLINARY PUNISHMENT. 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

Addington v. Texas, 441 U.S. 418 (1979) 22

Blackwell, Inc. DBA Kuka's Place v. Kenneth Fischer, U.S. Court of Appeals for the Sixth Circuit, No. 92-4203, decided November 8, 1993, 1993 U.S. App. LEXIS 29295 18

Delaware State College v. Ricks, 449 U.S. 250 (1980) 7-18, 20-21

Dixon v. Anderson, 928 F.2d 212, (6th Cir. 1991) 18

Dunleavy v. Local 1617, United Steelworkers of America, 814 F.2d 1087 (6th Cir. 1987) 18-20

Harris v. Ladner, 127 F.3d 1121 (D.C. 1997) 12, 13

Lever v. Northwestern University, 979 F.2d 552 (7th Cir. 1992), *cert.den.* 508 U.S. 951 (1993) 15, 16

McCoy v. San Francisco, City and County, 14 F.3d 28 (9th Cir. 1994), *cert. den.* 117 S.Ct. 2481 (1997) 14, 15

Morse v. University of Vermont, 973 F.2d 122 (2d Cir. 1992) 7, 17

Other Authorities:

42 U.S.C. § 1983 1

20 U.S.C. § 1232h 2

42 U.S.C. § 1981 9

Pavela, *Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus*, 9 Journal of College & University Law 101, Vol. 2 (1982) 22

PETITION FOR WRIT OF CERTIORARI

Lincoln Herbert ("Petitioner") respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit is unpublished. It is attached hereto as Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 976 F.Supp. 331 (E.D.Pa. 1997). The District Court opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the Third Circuit was entered on June 5, 1998. Appendix D. Mr. Herbert's petition for rehearing was denied on September 17, 1998. Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1251.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case was brought under the Civil Rights Act, 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

> equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relieve shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Mr. Herbert contested the psychiatric punishments imposed upon him, in part, under the "Hatch Amendment," 20 U.S.C. § 1232h:

> **§1232h. Protection of pupil rights**
>
> (a) Inspection of instructional materials by parents or guardians
>
> All instructional materials, including teacher's manuals, films, tapes, or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.
>
> (b) Limits on survey, analysis, or evaluations
>
> No student shall be required, as part of any applicable program, to submit to s survey, analysis, or evaluation that reveals information concerning --

(1) political affiliations;
(2) mental and psychological problems potentially embarrassing to the student of his family;
(3) sex behavior or attitudes;
(4) illegal, anti-social, self-incriminating and demeaning behavior;
(5) critical appraisals of other individuals with whom respondents have close family relationships;
(6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; or
(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),

without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

(c) Notice

Educational agencies and institutions shall give parents and students effective notice of their rights under this section.

(d) Enforcement

The Secretary shall take such action as the Secretary determines appropriate to enforce this section, except that action to terminate assistance provided under an applicable program shall be taken only if the Secretary determines that --

(1) there has been a failure to comply with such section; and

(2) compliance with such section cannot be secured by voluntary means.

(e) Office and review board

The Secretary shall establish and designate an office and review board within the Department of Education to investigate, process, review, and adjudicate violations of the rights established under this section.

This case also involves the provisions of Temple Law School's administrative Code of Student Conduct (hereafter, "Code"), relevant portions of which appear in Appendix E.

STATEMENT OF THE CASE

When Lincoln Herbert defended himself from a mugging on the Temple Law School campus on May 5, 1994, he could not have imagined the Kafkaesque events which were to follow. Instead of being protected by the school as the crime victim which he was, Mr. Herbert was subjected to a disciplinary hearing at which he was found guilty of lying to the dean of the law school about this incident. He was suspended for 2-½ years and was subjected to psychiatric punishment. He has since passed a polygraph examination, Appendix H, 55a-56a. The psychiatrist who examined Mr. Herbert wrote, "Mr. Herbert manifested no clinical evidence of mental illness. Moreover, no basis was found for the requirement of a psychiatric examination . . ." Appendix I, 59a. The procedural obstacles which are the subject of this Petition have overwhelmed the serious substantive issues raised in Mr. Herbert's Amended Complaint. Only this Court stands between Mr. Herbert and injustice.

Third-year law student Lincoln Herbert was accused and was found guilty of lying to Robert J. Reinstein, the Dean of Temple Law School, about being mugged outside the law school during final examination week in May, 1994. Specifically, the Dean told Mr. Herbert that he believed Mr. Herbert had lied about his assailant's saying that he had a knife and about his assailant's reaching into his coat as if reaching for a knife. Consequently, the Dean referred Mr. Herbert to Temple Law's Disciplinary Counsel, who instituted disciplinary proceedings.[1]

---

[1] The Dean also summarily suspended Mr. Herbert. Mr. Herbert challenged his initial suspension by filing a lawsuit in the United States District Court for the Eastern District of Pennsylvania on September 21, 1994. This lawsuit has been fully litigated.

On October 3, 1994, Temple Law's Discipline Committee found Mr. Herbert guilty of "communicat[ing] to a member of the Faculty or Administration serious falsehoods concerning the official business of the law school." Appendix F, 48a-50a. Following two days of penalty hearings, the Discipline Committee proposed on October 17, 1994 that Mr. Herbert be suspended for 2-½ years, undergo 100 hours of psychological counseling, and perform 100 hours of community service. Appendix F, 48a-50a.

Mr. Herbert directly challenged the findings and recommended punishments by following the Code's direct review procedures. Appendix E, 42a-47a. At the first stage of direct review, the Law School Review Panel significantly modified the penalties recommended by the Discipline Committee. The Review Panel vacated the punishment of 100 hours of psychological counseling, but replaced it with a psychiatric punishment. The Review Panel required Mr. Herbert, at his own expense, to undergo complete psychiatric evaluation and appropriate treatment, if any, as recommended by the examining psychiatrist. The Panel otherwise affirmed the findings and recommendations for punishment. Appendix G, 51a-54a.

Because the recommended sanctions included suspension, the Code required that Mr. Herbert's case be automatically heard by the Plenary Faculty before the punishments could become final. Section VI.D.(8)(a), Appendix E, 46a. On January 18, 1995, Mr. Herbert was officially notified that the Plenary Faculty vacated the community service punishment, but otherwise decided to impose the 2-½ year suspension and psychiatric punishment. The completion of the review process by the Plenary Faculty made the administrative verdict and punishments "final" pursuant to the Code.

Mr. Herbert filed the instant lawsuit on January 21,

1997. As the Third Circuit noted,[2] this filing would have been timely had Mr. Herbert's action accrued on January 18, 1995, the date that he was notified of the finalization of punishments by the Plenary Faculty. Defendants responded to the Complaint by filing a Motion for F.R.C.P. 11 sanctions. Mr. Herbert answered that Motion by filing a four-count Amended Complaint. Defendants reasserted their F.R.C.P. 11 Motion to Mr. Herbert's Amended Complaint. Following Mr. Herbert's Answer to the Motion, Defendants' Reply and Mr. Herbert's Rebuttal, the District Court denied the Motion for Sanctions, but considered the Motion as one to dismiss under F.R.C.P. 12(b)(6).

On August 22, 1997, the District Court filed an Opinion which held that three of the four counts of the Amended Complaint were untimely and that three of the counts were barred by collateral estoppel/res judicata. The District Court found that under *Delaware State College v. Ricks*, 449 U.S. 250 (1980), Mr. Herbert's action accrued on October 17, 1994, the date on which the Discipline Committee announced its recommended punishments and communicated them to Mr. Herbert. The District Court reasoned that because Mr. Herbert complained about the finding of guilt and the punishments imposed upon him, the violations of Mr. Herbert's civil rights occurred when Mr. Herbert first heard the Discipline Committee announce its recommended punishments. Appendix B, *Mem. Op.*, 18a-19a.

In an unpublished Memorandum Opinion, the Third Circuit affirmed. The Third Circuit relied upon *Ricks* and *Morse v. University of Vermont*, 973 F.2d 122 (2d Cir. 1992) for the proposition that internal administrative reviews have no effect upon statutes of limitations in civil rights cases. Appendix B, *Mem. Op.* at 6. Neither the Third Circuit nor

---

[2] Appendix A, 5a, 3d Circuit *Mem. Op.*, n.2.

the District Court addressed the finality issue.[3]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHAT GOVERNS CLAIM ACCRUAL DATES FOR CHALLENGES TO ADMINISTRATIVE DECISIONS: "FINALITY" OR "NOTICE."

1. Introduction

The Circuit Courts of Appeal are split in applying this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) to accrual of civil rights actions for statute of limitations purposes when the Plaintiff's civil rights are violated by administrative actions. Because *Ricks* involved a college professor denied tenure, the case has been applied extensively to employment and tenure cases. In such cases, however, finality, and therefore, the date of accrual, is usually not difficult to determine. As in *Ricks*, upon denial of tenure at most colleges and universities, a one-year termination contract is offered. The D.C., Seventh and Ninth Circuits have held that *Ricks* requires administrative decisions to be "final" in order to start the period of limitations. Other than the Third Circuit in this case, the Second and the Sixth Circuits have held not only that finality is not required, but that waiting for finality is prohibited by *Ricks*. Petitioner requests this Court to resolve this conflict.

---

[3] The Third Circuit declined to address the res judicata/collateral estoppel issues with regard to Counts 1, 2 and 4 of the Amended Complaint. *Mem. Op.*, Appendix A, 7a, n.5. Consequently, those issues are not addressed in this Petition for Writ of Certiorari.

2.
This Court's Decision in *Ricks*

Professor Ricks, the plaintiff in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), was a black Liberian who joined the Delaware State College faculty in 1970. In February, 1973, the Faculty Committee on Promotions and Tenure recommended that he not receive tenure, although the Committee agreed to reconsider its decision the following year. In 1974, when it reconsidered its decision, the Committee adhered to its prior recommendation. *Id.* at 252. In March, 1974, the Faculty Senate voted to support the recommendation. On March 13, 1974, the College Board of Trustees voted to deny tenure to Professor Ricks. *Id.* Thereafter, Professor Ricks filed a grievance with the Board's Educational Policy Committee, which ultimately denied the grievance. *Id.*

Professor Ricks sued the College and various administrators, alleging discrimination on the basis of national origin in violation of Title VII and 42 U.S.C. § 1981. The College moved to dismiss on the grounds that the claims were barred by Delaware's three-year statute of limitations. The District Court granted the motion. On appeal, the Third Circuit reversed, holding that, for policy reasons, the last day of employment should begin the period of limitations. *Id.* at 255-256.

In reversing the Third Circuit, this Court concluded that a civil rights action accrues, and the period of limitations begins to run, when (1) a discriminatory decision is made, and (2) the plaintiff is notified of that decision in writing. *Id.* at 259. In determining when the decision (i.e. the denial of tenure) was made, the Court noted that the grievance procedure did not delay the start of the limitations period.

The Third Circuit in this case and those circuits

applying the "notice" test failed to appreciate the concept of "finality" embedded in this Court's holding in *Ricks*:

> The June 26 letter itself characterized that [the denial of tenure] as the Board's "official position." *Id.* It is apparent, of course, that the Board in the June 26 letter indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made.
>
> As to the latter argument, we have already held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period. [Citation omitted].

Id. at 261.

Implicit in this holding is the requirement that the decision alleged to be discriminatory is final, not tentative. Hence, where an institution's internal procedures allow direct review before a decision becomes final, the statute of limitations does not begin to run until the direct review process concludes.

In contrast to the grievance procedure identified in *Ricks*, Temple's internal disciplinary procedures in this case **required** the Plenary Faculty to approve the punishments, which included suspension, before they could become "final."

Appendix E at 46a. Mr. Herbert availed himself of the direct review was able to modify the decision before it became "final." The review was therefore direct, not collateral, because it came before, not after, the final decision. Until Plenary Faculty approval, the finding of guilt and recommendations for punishments were "tentative."

The circuits are deeply divided about when civil rights cases accrue where litigants are enmeshed in administrative proceedings. Some circuits require that an administrative decision be "final" before the statute of limitations starts to run; other circuits begin the statute of limitations clock when a litigant first receives "notice" of a discriminatory act. By granting certiorari and reversing the Third Circuit in this case, this Court can clarify the issue of accrual as it relates to ongoing administrative proceedings and further the goals of fairness and judicial economy.

3.

The D.C., Ninth and Seventh Circuits Require Finality.

A.

D.C. Circuit

In *Harris v. Ladner*, 127 F.3d 1121 (D.C. Cir. 1997), the United States Court of Appeals for the District of Columbia Circuit interpreted *Ricks* to require a final decision of an administrative body before a civil rights action accrued and the period of limitations commenced. There, Mary Harris applied for and was denied promotion to associate professor at Howard University, a private institution.

Notice of the denial was given in a letter dated October 31, 1991. *Harris*, supra at 1122. Professor Harris resubmitted her tenure application as prescribed in the University's policy manual on tenure applications. *Id.* By letter dated March 25, 1992, the dean notified Professor Harris that the recommendation to deny tenure was unchanged. *Id.*

On March 24, 1995, Professor Harris filed a complaint in the United States District Court for the District of Columbia, alleging "(1) race discrimination in violation of 42 U.S.C. §1981, (2) violation of equal protection and due process under the fifth and fourteenth amendments, (3) breach of contract, (4) tortious violation of a common law right of "fair procedure," and (5) tortious interference with contract." *Id.* at 1123. The District Court dismissed the complaint, relying on *Ricks*. It held that Professor Harris' cause of action had accrued when she was first notified of the decision by the October 31, 1991 letter, thus triggering the three-year statute of limitations. The District Court reasoned that the resubmission of her application was a form of "collateral review" which, according to *Ricks*, did not alter the finality

of the October 31 decision. *Id.*

On appeal, the D.C. Circuit reversed. Again, relying on *Ricks*, the Circuit Court first determined the precise discriminatory act complained of and when it occurred. In its analysis, the Circuit Court determined that the resubmission process was not a collateral attack on a final decision. Rather, under the University's own guidelines, resubmission was part of the tenure application process before a final decision on tenure was made, separate and apart from the University's grievance procedure that applied only after a final decision was made. *Harris*, supra at 1124. The Circuit Court's decision was, in its view, entirely consistent with this Court's decision in *Ricks*:

> Our disposition of this case does not disturb or undercut the holding in *Ricks* that the 'existence of careful procedure to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made.' [quoting *Ricks*] **Rather, our holding is restricted to Harris's allegations regarding the reconsideration process afforded her, which process, although termed "reconsideration," does not appear to be like the collateral review at issue in *Ricks*. Rather, under the University's procedures as set forth in its Guidelines and conceded at oral argument, the reconsideration provided Harris appears to occur only prior to the final tenure decision**. [Emphasis supplied].

Id. at 1125.

B.
Ninth Circuit

The Ninth Circuit also requires finality of administrative decisions before commencing the period of limitations in civil rights cases. In *McCoy v. San Francisco*, 14 F.3d 28 (9th Cir. 1994), *cert. den.*, 117 S.Ct. 2481 (1997), the City began disciplinary proceedings against a police officer. The Police Commission held disciplinary hearings on May 7, June 5, and August 29, 1990. *Id.* at 29. At the end of the August 29, 1990 hearing, the Commission stated orally its decision to suspend the officer. The Commission then issued a written decision on September 13, 1990 in accordance with its procedures. *Id.* The police officer sued for violation of his civil rights. He filed his complaint on September 3, 1991, timely if the discriminatory act were the written decision, untimely if it were the oral notice. The District Court dismissed the case with prejudice on other grounds and without prejudice as to the statute of limitations. The officer filed an Amended Complaint, which was dismissed as untimely. *Id.*

On appeal, the Ninth Circuit reversed. After noting that *Ricks* governed the issue in the case, the Court analyzed the oral and written decisions in the context of the Police Commission practice. Ultimately, the Court held that the oral notice was not "final" and could not start the limitations period:

> We conclude that the written decision rather than the oral decision triggered the statute of limitations. Although McCoy "knew" of the Commission's decision at the conclusion of the August 29 hearing, he also knew that the Commission would issue a more detailed written decision. The written decision supplied the rationale of the Commission,

> addressed the defenses raised by McCoy, and set the dates of the suspension. The written decision clearly was the "final decision" that triggered the applicable statute of limitations.

Id. at 30.

C.
Seventh Circuit

The Seventh Circuit also interprets *Ricks* to require a final decision to begin the period of limitations. In *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. den.*, 508 U.S. 951 (1993), Professor Janet Lever sued the University, claiming she was discriminated against when she was denied tenure. There, the Dean notified Lever of his "recommendation" that she not be offered tenure on May 5, 1980. Subsequently, Professor Lever appealed and the Provost issued his "final decision" on February 12, 1981. *Id.* at 553. The University's faculty handbook set forth the tenure process. According to the handbook, the Dean of the college would send a "recommendation" to the Provost, which would become final unless an appeal was filed within a certain period. *Id.* at 554. Lever's complaint was timely if the Provost's decision was the discriminatory act; untimely if it was the Dean's "recommendation." *Id.* at 553. The District Court held that, based on the facts of the case, the Dean's decision was final and the period of limitations commenced on the date of his recommendation.

Judge Easterbrook, writing for the Circuit Court, noted that when a discriminatory act occurs is a question of fact. *Id.* at 553. He then reviewed the District Court record, which showed that the faculty handbook was ambiguous and did not reveal the identity of the final decision-maker on tenure, the Dean or the Provost. The testimony in the District Court

revealed that, under the University's practice, the Dean's "recommendation" was a final decision, which was subject to change by the Provost. Judge Easterbrook also noted that Lever knew the Dean's recommendation was final and even characterized the Dean's letter as the discriminatory act in her E.E.O.C. complaint. *Id.* at 554-555. Thus, the Circuit Court held that the decision of the District Court was not clearly erroneous and the decision was affirmed. *Id.* at 557.

4.
The Second, Third, and Sixth Circuits Do Not Require Finality Under *Ricks*

The Second, Third and Sixth Circuits have decided limitation questions relying on *Ricks* and do not require a "final" decision to begin the period of limitations. Indeed, these courts do not even analyze the finality question.

A.
Second Circuit

The Second Circuit has held that internal administrative reviews have no effect on the period of limitations. In *Morse v. University of Vermont*, 973 F.2d 122 (2d Cir. 1992), a masters degree candidate was dismissed after failing to complete her course work in the required time. The University did, however, offer to readmit her in another masters program under certain conditions. The conditions were not acceptable to the candidate and the offer of readmission was withdrawn. *Id.* at 124.

After her administrative appeals were denied, the candidate sued, claiming that she was disabled and that the University failed to accommodate her disability. The District Court dismissed the case as untimely and the Second Circuit affirmed. The Second Circuit did not analyze the University procedures to determine when the decisions to terminate or withdraw readmission became final. Instead, the Court blindly followed *Ricks* and measured the limitations period from the time of the notices of dismissal and withdrawal of readmission. *Morse*, supra at 125.

B.
Sixth Circuit[4]

The Sixth Circuit also focuses upon the "notice" aspect of *Ricks*. Under the "notice" interpretation, the limitations period commences once the plaintiff knows or has reason to know of a potential injury which might form the

---

[4] For unknown reasons, many Sixth Circuit Opinions are not published in the Federal Reporter. The cited opinions are not so much offered for precedential value as they are to illustrate how the Sixth Circuit has decided *Ricks* issues.

basis of his complaint, even if the injury might never occur.

In *Blackwell, Inc. DBA Kuka's Place v. Kenneth Fischer*, U.S. Court of Appeals for the Sixth Circuit (No. 92-4203, November 8, 1993)(1993 U.S. App. LEXIS 29295), for example, the Court held that a claim was time-barred under Ohio's two-year statute of limitations. There, the legislature passed a law by special option election on November 9, 1989, which had the effect of revoking Blackwell's liquor license. Blackwell challenged the validity of the statute in the Ohio courts. In October, 1991, Blackwell's challenge failed. Ultimately, in an unrelated action, the Sixth Circuit found the statute unconstitutional on its face, after which Blackwell filed his complaint alleging violation of his civil rights. The Court dismissed the civil rights case as untimely and the Sixth Circuit upheld the dismissal:

> It is well-settled in this court that 'the statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action.'. . . In determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights.
>
> 1993 U.S.App. LEXIS 29295*4, citing *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).

The deficiencies in the "notice" analysis are apparent, even to the Sixth Circuit, when applied to a set of facts that compel a contrary result. In *Dunleavy v. Local 1617, United Steelworkers of America*, 814 F.2d 1087 (6th Cir. 1987), for example, the court refused to dismiss a claim of an individual steelworker under the Labor Management Reporting and

Disclosure Act ("LMRDA"). The steelworker alleged that his employer had disciplined him in retaliation for his political views and, in accordance with the union's constitution, pursued optional administrative remedies before filing the federal action. The District Court held the complaint was time-barred. The Sixth Circuit reversed, holding that the statute of limitations was tolled in that case, but only on a narrow policy exception applied to LMRDA cases. *Id.* at 1091 n. 2. The Court's analysis, however, points out the tenuous rationale for relying on "notice" alone in virtually all other types of cases:

> The Union's position would seem to require one placed in Dunleavy's situation to file a lawsuit which would become superfluous in the event of favorable Convention action simply as a matter of protection. In addition to other practical objections to such filings, we feel constrained to point out that we would be loath to require further cluttering up the docket of the overburdened federal judicial system for such a contingent purpose.
>
> *Dunleavy*, 814 F.2d at 1091.

5.
The Present Case Would Be Decided Differently In Various Circuits

The present case demonstrates the danger in the competing interpretations of *Ricks*. While notice and finality are coterminous in many cases, they are not necessarily so intertwined. In the present case, Mr. Herbert was notified on October 17, 1994 of the punishment recommendations of the Discipline Committee. Appendix F. Mr. Herbert challenged the punishments on direct review and was able to obtain modification of them. The punishments became final under

Temple's administrative procedures when he was notified of the Plenary Faculty's approval of them, i.e., January 18, 1995. The D.C., Ninth and Seventh Circuits would have held that the limitations period began on this date, and that Mr. Herbert's complaint, therefore, was timely. The Second Circuit would probably have agreed with the Third Circuit's holding in this case that the statute of limitations commenced running on October 17, 1994, and that the complaint was untimely. The Sixth Circuit would probably have agreed on the accrual date, unless school disciplinary proceedings merited a special exception similar to that granted to union administrative proceedings in *Dunleavy*, supra.

Petitioner urges this Court to adopt the "finality" rule applied by the D.C., Ninth and Seventh Circuits. By so doing, this Court will not only correct an injustice, but will also further sound judicial policies.

6.
Adoption of The "Finality" Rule is Important to Sound Judicial Policy.

The Third Circuit's application of *Ricks* to this case encourages litigants not only to abandon administrative procedures in favor of Federal lawsuits, but practically requires them to do so. Almost all non-criminal disciplinary proceedings, such as employment termination proceedings, tenure hearings and the like, require that notice of the proceeding be given to the subject of the hearing. Where counsel must determine whether such notice is a "final" notice, or whether the administrative hearing is "direct" or "collateral," counsel will take the prudent route of filing a federal action in order to preserve the client's rights.

Worse yet, suits can and will be filed after administrative proceedings have begun and/or while direct administrative appeals are pending. Clients will be

encouraged to abandon such procedures as soon as an inkling of an adverse decision occurs. The burden that this interpretation of *Ricks* places on limited judicial resources is easily eliminated: This Court can draw a bright line by holding that all potential federal litigants who claim that their civil rights are violated by administrative decisions must exhaust direct administrative appeals prior to instituting federal civil rights lawsuits. Such direct administrative appeals do not include "grievance procedures." A steadfast requirement to exhaust direct administrative appeals encourages the orderly disposition of administrative processes while, at the same time, prevents unnecessary burdens imposed by prosecution of "protective" or unripe federal litigation.

II. A STATE UNIVERSITY MAY NOT USE FORCED SUBMISSION TO PSYCHIATRY AS A DISCIPLINARY PUNISHMENT.

Count 2 of Mr. Herbert's Amended Complaint contested the psychiatric punishment which was imposed upon him for "lying" to the law school Dean. In addition to finding that this count was untimely, the District Court also ruled that the Hatch Amendment, 20 U.S.C. § 1232h, was not intended to benefit Mr. Herbert. The District Court, however, ignored Mr. Herbert's other claims noted above. Mr. Herbert pleaded that psychiatric punishment was illegal, and that it unlawfully imposed a stigma on him, depriving him of his liberty interest in his good reputation for sound mental health.

The psychiatric sanction which Temple imposed upon Herbert was not enumerated in Temple's Code. See Appendix E at 38a-39a for a list of permissible sanctions. In addition, such sanction was unsupported by any evidence that Herbert's conduct was indicative of a serious psychological or psychiatric disorder. No member of the Discipline Committee had a psychiatric or psychological background. Thus, Mr.

Herbert was diagnosed by laymen. Had a "diagnosis" such as this one occurred outside the context of a school disciplinary proceeding, such would constitute the practice of psychiatric medicine or psychology without a license.[5]

As this Court has ruled in *Addington v. Texas*, 441 U.S. 418 (1979), the deprivation of a liberty interest requires a showing that the individual subjected to psychiatric care "suffers from something more serious than is demonstrated by idiosyncratic behavior" or "a few isolated instances of unusual conduct." *Id.* at 427. Despite the absence of any evidence that Herbert's actions were a function of a psychiatric or psychological disorder, Temple's Discipline Committee determined, for unstated reasons, that psychological treatment, later modified to psychiatric evaluation and treatment, was an appropriate punishment. This arbitrary and capricious extension of the state's power to impose psychiatry as a punishment warrants this Court's attention.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

PAUL, REICH & MYERS, P.C.

BY:_____
RICHARD P. MYERS

---

[5] See Pavela, *Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus*, 9 Journal of College & University Law 101, Vol. 2 (1982). This article discusses the justified "longstanding judicial distrust of psychiatric labeling." *Id.* at 126.

INDEX TO APPENDICES

Appendix A, Memorandum Opinion of Third Circuit 1a

Appendix B, Opinion of District Court 10a

Appendix C, Denial of Petition for Rehearing by Third Circuit 31a

Appendix D, Judgment of the Third Circuit 33a

Appendix E, Relevant Portions of Temple's Code of Student Conduct 35a

Appendix F, Report of the Law School Discipline Committee 48a

Appendix G, Report of the Law School Review Panel 51a

Appendix H, Report of Polygraph examination 55a

Appendix I, Report of Psychiatric examination 57a

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97- 1795

LINCOLN HERBERT.
Appellant

v.

ROBERT J. REINSTEIN, DEAN OF TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE-PRESIDENT OF TEMPLE UNIVERSITY; TEMPLE UNIVERSITY SCHOOL OF LAW; TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-00457)
District Judge: Honorable Clarence C. Newcomer

Submitted under Third Circuit LAR 34. l(a)
Thursday, May 21, 1998

BEFORE: ROTH, McKEE
and GARTH, Circuit lodges

(Filed: June 5, 1998)

MEMORANDUM OPINION OF THE COURT

Garth, Circuit Judge,

Appellant Lincoln Herbert ("Herbert") brings this appeal after the district court dismissed his amended complaint against Temple University, Temple University School of Law ("the Law School"), and Robert Reinstein ("Reinstein"), the Dean of the Law School (hereinafter, collectively referred to as "Temple") for alleged violations of his civil rights and for allegedly breaching its contract with him when it suspended him from the Law School. For the reasons outlined below, we affirm.

I.

This case arises against the backdrop of a previous litigated dispute among the same parties. Herbert was a student at the Law School. On May 3, 1994, he was involved in an altercation with a homeless man in which Herbert ultimately sprayed the man with pepper gas. When confronted by Reinstein on May 5, 1994, about this incident, Herbert claimed that he had sprayed the pepper gas while attempting to ward off an attack by a homeless man threatening him with a knife. Herbert also claimed that the homeless man followed him into the Law School after Herbert had sprayed the pepper gas. Accounts from witnesses and campus police, however, suggested that Herbert was not threatened with a knife nor was he in danger once he entered the Law School.

Prior to the meeting between Reinstein and Herbert, Reinstein had learned of other altercations -- both physical and verbal -- and other activities (such as involvement in the Western Heritage Society, a right-wing student organization that was unpopular among the students and faculty at Temple) with which Herbert was involved. Based on the evidence before him, Reinstein determined that Herbert was a danger to the law school community, suspended Herbert, and referred

Herbert's case to the Law School's disciplinary system. Herbert, however, claimed that Reinstein's reason for the suspension was pretextual and was based upon the fact that Reinstein disagreed with Herbert's political philosophies.

Before the disciplinary committee, Herbert was charged with violating the Law School Code of Student Conduct by engaging in acts of violence and by telling falsehoods to a University administrator. After reviewing the evidence, the committee found Herbert "not guilty" of engaging in acts of violence, but found him "guilty" of telling falsehoods to Dean Reinstein. Thus, on October 17, 1994, the disciplinary committee voted to suspend Herbert from the Law School until January 1997, at which time he would be able to return to the law school on a probationary basis. The committee also imposed a requirement that Herbert undergo 100 hours of psychological therapy and perform 100 hours of community service. The sanction of community service was later repealed during the Law School's internal appeal process.

In an earlier filed action, on September 20, 1994, Herbert filed a *pro se* motion for a TRO and a complaint against Reinstein, the Law School, and Temple, the same defendants named in the instant case. In his complaint, Herbert alleged violations of his due process, freedom of speech, and freedom of association rights under the First and Fourteenth Amendments and § 1983.

The district court denied Herbert's request for a TRO on September 21, 1994, and thereafter conducted a trial in which it entered judgment in favor of Reinstein and Temple on October 21, 1994. Although the district court found, inter alia, that Herbert was afforded all of the process he was due with respect to his initial suspension by Reinstein and by the disciplinary committee, we reversed that ruling on appeal only

with respect to the initial suspension by Reinstein.[1] Accordingly, the case was remanded for the determination of damages, and on remand the district court awarded Herbert one (1) dollar in nominal damages.

On January 21, 1997, Herbert filed the present suit against Reinstein, Temple, the Law School, and several other defendants. In response, on March 7, 1997, several of the defendants filed a motion for sanctions pursuant to Rule 11. Herbert thereafter filed an amended complaint naming only Reinstein, Temple, and the Law School as defendants.

The amended complaint consists of four counts. In Count 1, Herbert alleges that his rights under § 1983 and the Fourteenth Amendment were violated by unlawful proceedings. In Count 2, Herbert alleges that rights under § 1983, the Fourteenth Amendment, and 20 U.S.C. § 1232h were violated by the disciplinary committee's imposition of a condition that Herbert receive psychiatric counseling as a precondition for his returning to the Law School. In Count 3, Herbert alleges that Temple breached its covenant of good faith and fair dealing through its actions. In Count 4, Herbert alleges that his § 1983 and First Amendment rights were infringed upon by a denial of his rights of speech, petition, assembly, and association from 1993 to 1997.

II.

The district court dismissed Counts 1, 2, and 4 of Herbert's amended complaint because they fell outside the

---

[1] In an unpublished opinion, we explained that Reinstein should have raised at the initial May 5, 1994, meeting Herbert's prior incidents of aggressive behavior and should have informed Herbert that these incidents influenced Reinstein's decision to suspend Herbert.

applicable statute of limitations period. As none of the parties disputes that the applicable statute of limitations in this case is two (2) years, the statute of limitations issue on this appeal revolves around when Herbert's cause of action accrued.

The district court held that Herbert's cause of action accrued on October 17, 1994, the date that the disciplinary committee announced its proposed punishments. Herbert contends that the proper date that should have been used to calculate when his cause of action accrued is January 18, 1995[2] i.e., the date that the punishments became final. In support of his position, Herbert points to case law holding that statutes of limitations do not run until administrative appeals are exhausted. See, e.g., Jeremy H. by Hunter v. Mount Lebanon Sch., 95 F.3d 272, 280-81 (3d Cir. 1996) (holding that cause of action brought pursuant to the Individuals with Disabilities Education Act ("IDEA") does not accrue until statutory administrative appeals are exhausted).

Temple counters that in § 1983 cases, the cause of action accrues -- and thus the statute of limitations runs -- from the moment when the plaintiff knew or should have known that his or her rights have been violated. As Herbert was aware that he had been suspended on October 17, 1994, Temple submits that such is the date from which the statute of limitations runs in this case. Temple contends that Herbert's "exhaustion of the administrative remedies" argument does not apply to the case at hand because this case does not involve an administrative framework under which a plaintiff must pursue his administrative remedies prior to

---

[2] Even though Herbert filed his complaint in the instant action on January 21, 1997, his complaint was timely because January 18, 1997 fell on a Saturday, and January 20, 1997 was Martin Luther King, Jr. Day. See Fed. R. Civ. P. 6(a).

filing an action in court.

We agree. In Chardon v. Fernandez, 454 U.S. 6 (1981), the Supreme Court explained that a cause of action accrues at "the time of the *discriminatory* act, not the point at which the *consequences* of the act become painful." Id. at 8 (emphasis in original). Put another way, it is the "discovery of the original act of discrimination, not future confirmation of the injury or determination that the injury is unlawful, . . . when the statute of limitations begins to run." Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 551 (7th Cir. 1996).

Courts consistently have rejected the argument that Herbert advances in this appeal; namely, that pursuit of some internal appeal should toll the statute of limitations. See. e.g., Delaware State College v. Ricks, 449 U.S. 250, 261 (1980) (holding that initiation of grievance procedure did not toll accrual date on claim); Soignier, 92 F.3d at 553 (holding that employee's pursuit of internal grievance procedure does not affect accrual date); Morse v. University of Vermont, 973 F.2d 122 (2d Cir. 1992) ("an internal administrative review of [an] allegedly discriminatory decision has no effect on when the statute of limitations period begins to run").

In addition, the present case does not involve a statutory administrative procedure such as that described in Jeremy H. under the IDEA such that Herbert was obliged to exhaust his administrative remedies prior to filing his claim in court. See Jeremy H., 95 F.3d at 280. Accordingly, we conclude that Herbert's claims arising in Counts 1, 2, and 4 of his amended complaint accrued on October 17, 1994 -- the date the disciplinary committee meted out its sanctions and thus the date that Herbert was aware or should have been aware of his alleged injuries. Thus, the district court properly applied the appropriate limitations period with

respect to Counts 1, 2, and 4.[3]

III.

Count 3 alleges that Temple breached its contract and implied covenants of good faith and fair dealing that arose out of Herbert's matriculation and tuition payments to the Law School. The district court dismissed Count 3 of the amended complaint by holding that it was barred by the doctrine of *res judicata*.[4]

On appeal, Herbert contends that the district court procedurally erred by barring his Count 3 claims under the doctrine of *res judicata*. Herbert argues that *res judicata* cannot be determined solely by the pleadings and thus the preclusive effect of any prior action should not be applied on a Motion to Dismiss made pursuant to Rule 12(b)(6). As the district court relied upon materials outside of the pleadings, Herbert maintains that if the court wanted to rule on the preclusive effect of the prior case, the court should have

---

[3] Herbert asserts that his claim in Count 4 is preserved because of Temple's continuous violation from May 1994 until January 1997, during which time Herbert was denied access to campus. We reject this argument. The harm of which Herbert complains is merely the result of the alleged in jury that occurred when Herbert was suspended. Thus, the same accrual date -- October 17, 1994, applies to Count 4.

[4] The district court also held that Count 1 was barred by collateral estoppel and that Count 4 was barred by the doctrine of *res judicata*. Because we have held above that Counts 1 and 4 are barred by the two (2 year statutory bar, we decline to address the preclusive effect that any prior action may have had on those counts.

converted the Motion to Dismiss into a Motion for Summary Judgment, given the parties reasonable opportunity and notice, and given him an opportunity to demonstrate that summary judgment was inappropriate in this case.

We disagree. In Rycoline Products v. C & W Unlimited, 109 F.3d 883 (3d Cir. 1997), we stated that *res judicata* is an affirmative defense that "could be the grounds for a motion to dismiss for failure to state a claim upon which relief can be granted." Id at 886. We noted, however, that if the "'bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal under 12(b)(6). "' Id. (citing Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978)).

Under federal law, *res judicata* requires a defendant to establish that there has been (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action. See Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991). In determining whether two suits are based upon the same cause of action, the court evaluates the "'essential similarity of the underlying events giving rise to the various legal claims."' Id. (quoting Davis v. United States Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982) (en bane). The promotes the policy of judicial economy which requires that a plaintiff "'present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence."' Lubrizol, 929 F.2d at 963 (quoting United States v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984)).

In the instant case, the face of the amended complaint indicates that the breach of contract claims raised by Herbert in Count 3 could have been brought in his earlier action before the district court. Indeed, the breach of contract claim arises out of his initial suspension by Reinstein, Reinstein's

alleged pretextual reason for suspending him, and the subsequent disciplinary hearings and punishments that developed thereafter. Thus, on its face, this breach of contract claim from the present action and the due process and freedom of speech and association claims from the initial complaint arose out of the same transaction or occurrence with Reinstein and Herbert's ensuing suspension. Accordingly, we conclude that the district court did not err in invoking the *res judicata* bar to Count 3 of Herbert's amended complaint on a Motion to Dismiss.

IV.

In sum, we will affirm the district court's order dated August 22, 1997, dismissing Herbert's amended complaint.

TO THE CLERK:

Please file the foregoing memorandum opinion.

/s/Garth
Circuit Judge

DATED: June 5, 1998

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINCOLN J. HERBERT	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT J. REINSTEIN, et. al.	:	NO. 97-0457

Newcomer, J. August 22, 1997

M E M O R A N D U M

Presently before this Court are defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11, and in the Alternative, for Dismissal Under Federal Rule of Civil Procedure 12(b)(6), and plaintiff's response thereto, and defendants' reply thereto, and plaintiff's rebuttal to defendants' reply. For the reasons that follow, this Court grants in part and denies in part defendants' Motion.

I. Facts and Procedural History

This action grows out of an ongoing and contentious dispute between the plaintiff Lincoln Herbert and the defendants Temple University School of Law ("Law School"), Temple University ("Temple") and Robert J. Reinstein, Dean of the Law School. Prior to this instant action, Mr. Herbert sued the same defendants from this action in this Court. In this earlier action, this Court made extensive findings of fact and conclusions of law. Herbert v. Reinstein, No. CIV.A.94-5765, 1994 WL 587095 (E.D. Pa. Oct. 21, 1994). In order to put the instant action into its proper context, the Court will

set forth the relevant factual and procedural background from Mr. Herbert's first action.

On May 3, 1994, Mr. Herbert, a student at the Law School, was involved in an altercation with a homeless person, whom Mr. Herbert sprayed with "pepper gas." An asthmatic Law School employee was exposed to some of the pepper gas left in the wake of the incident and was hospitalized with injuries caused by the gas. Dean Reinstein, having solicited accounts of the events of May 3, 1994, from various witnesses and Temple campus police, called Mr. Herbert into his office on May 5, 1994. Mr. Herbert claimed that he had inadvertently sprayed the employee while attempting to ward off an attack by a homeless person brandishing a knife. Reports by the police and witnesses contradicted Mr. Herbert's account of the incident. These reports indicated that the homeless person did not have a knife and that Mr. Herbert was not in any danger inside the law school. Dean Reinstein decided that Mr. Herbert represented a "clear and present danger" to the law school community, whereupon Dean Reinstein suspended Mr. Herbert and referred the case to the Law School's disciplinary system. Prior to Mr. Herbert's suspension on May 5, 1994, other activities of Mr. Herbert at the law school had come to the attention of Dean Reinstein. While a student at the Law School. Mr. Herbert founded and acted as president of the Western Heritage Society (WHS), a "right-wing" student organization. The opinions of Mr. Herbert and the WHS were unpopular among many students, faculty and administrators at Temple and the Law School. Dean Reinstein was aware of various other incidents in which Mr. Herbert had been involved in physical and verbal altercations. Mr. Herbert alleged that Dean Reinstein's stated reason for the suspension was a pretext and that Dean Reinstein actually suspended Mr. Herbert because he disagreed with Mr. Herbert's political philosophy.

At the proceedings before the disciplinary committee, Mr. Herbert was charged with violating the Law School Code of Student Conduct by engaging in acts of violence and by telling falsehoods to a University administrator. After reviewing all the evidence, the panel found Mr. Herbert not guilty of engaging in acts of violence and guilty of telling falsehoods to Dean Reinstein. On October 17, 1994, the disciplinary committee voted to suspend Mr. Herbert from the law school until January 1997, at which time he could return as a student on a probationary basis.

The committee also voted to require that Mr. Herbert undergo 100 hours of psychological therapy and perform 100 hours of community service. The sanction requiring community service was removed through the Law School's internal appeals process. On September 20, 1994, Mr. Herbert, proceeding pro se, filed a motion for a temporary restraining order (TRO), a memorandum of law in support of his request for a TRO and a complaint (Original Complaint) with this Court. The defendants named in that suit were the same defendants as those named in the instant lawsuit. In the Original Complaint, Mr. Herbert alleged violations of his due process, free speech and free association rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983.

This Court denied Mr. Herbert's motion for a TRO on September 21, 1994, and ordered consolidation of plaintiff's request for a preliminary injunction with a trial on the merits under Federal Rule of Civil Procedure 65(a)(2). Plaintiff's case was tried before this Court, which entered judgment in favor of defendants and rendered findings of fact and conclusions of law in a Memorandum Opinion dated October 21, 1994. The Court found, inter alia, that Mr. Herbert was afforded all the process he was due in his initial suspension from the Law School on May 5, 1994 and at the subsequent internal Law School disciplinary hearing held on October 3

and 10, 1994. Plaintiff appealed this Court's Order, dated October 1, 1994, to the United States Court of Appeals for the Third Circuit on November 18, 1994. On October 6, 1995, a three-judge panel of the Third Circuit affirmed this Court's denial of injunctive relief in an unpublished opinion. Herbert v. Reinstein, No. 94-2138, slip op. at 18 (3d Cir. Oct. 6, 1995). However, the majority reversed in part, finding that while the internal disciplinary process eventually afforded Mr. Herbert sufficient due process, he had not been provided all the process he was due at his initial May 5, 1994 meeting with Dean Reinstein. Id at 13. Specifically, the majority found that Dean Reinstein should have raised again with Mr. Herbert his prior incidents of aggressive behavior and should have informed Mr. Herbert that these prior incidents influenced his decision to temporarily suspend Mr. Herbert. Id. The Third Circuit remanded the case to this Court for determination of any damages. This Court held a damages hearing on February 20, 1996. On February 23, 1996, this Court entered findings of fact and conclusions of law, awarding Mr. Herbert one dollar in nominal damages. Herbert v. Temple University School of Law, No. CIV.A.94-5765, 1996 WL 84849, at *4 (E.D. Pa. Feb. 23, 1996). Subsequently, Temple sent Mr. Herbert a check for the award, which he rejected. Mr. Herbert appealed pro se this Court's February 23, 1996 Order. His appeal was recently dismissed by the Third Circuit on procedural grounds.

On January 21, 1997, Mr. Herbert filed the instant action against numerous defendants, including the defendants who were named in his first suit. On March 7, 1997, certain of the defendants served plaintiff's counsel with a motion for sanctions against plaintiff and plaintiff's counsel pursuant to Federal Rule of Civil Procedure 11. In the face of this motion for sanctions, plaintiff, represented by new lead counsel, filed an Amended Complaint on March 28, 1997. Mr. Herbert's Amended Complaint dropped many of the claims and defendants named in the first complaint. The

Amended Complaint names as defendants Temple, the Law School and Dean Reinstein. The Amended Complaint consists of four counts. In Count 1, Mr. Herbert alleges that his rights under 42 U.S.C. § 1983 and the Fourteenth Amendment were violated by unlawful proceedings. In Count 2, Mr. Herbert alleges that his rights under § 1983, the Fourteenth Amendment, and 20 U.S.C. § 1232h were violated by the imposition of a sanction requiring psychiatric counseling. In Count 3, Mr. Herbert alleges that Temple breached a covenant of good faith and fair dealing through its actions. In Count 4, Mr. Herbert alleges that his Section 1983 and First Amendment rights were violated by a denial of rights of speech, petition, assembly, and association from 1993 to 1997. Presently before this Court is defendants' motion for Rule 11 sanctions, and in the alternative, for dismissal under Federal Rule of Civil Procedure 12(b)(6).[1] The defendants argue (1) that Counts 1, 2, and 4 of the Amended Complaint are time-barred under the applicable two-year statute of limitations; (2) that Counts 1, 3, and 4 are barred by the doctrines of res judicata or collateral estoppel; and (3) that Count 2, in addition to being time-barred, is without merit as a matter of law. In the motion for sanctions, defendants move in the alternative for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

Mr. Herbert rejoins that Counts 1, 2, and 4 are not time-barred for two reasons. First, Mr. Herbert asserts that his cause of action did not accrue until January 18, 1995, the date on which the plenary faculty affirmed in part the sanctions handed down by the disciplinary committee. Second, Mr. Herbert argues that since January 18, 19, and 20,

---

[1] Defendants Temple and the Law School originally filed this motion on April 23, 1997, and Dean Reinstein, who at the time of the filing of the motion had not bee properly served with Plaintiff's complaint, joined in this motion on June 5, 1997.

1997, fell on Saturday, Sunday, and Martin Luther King, Jr. Day, Federal Rule of Civil Procedure 6(a) allowed him to file on the January 21, 1997. Mr. Herbert argues that Counts 1, 3, and 4 should not be barred by res judicata or collateral estoppel because in his Complaint, dated September 15, 1994, he only raised the issue of his initial suspension by Dean Reinstein, and not the suspension and sanctions determined by the disciplinary committee. Mr. Herbert argues that Count 2, alleging violations of Section 1232h, is not lacking in merit, and therefore not sanctionable. Mr. Herbert's counsel also argues that their investigation, including a polygraph examination, was sufficient to determine that their client was telling the truth."

II. Standards

A. Rule 11 Standard

Courts are to give the Federal Rules of Civil Procedure their plain meaning. Business Guides, Inc. v. Chromatic Comm. Enter., Inc., 498 U.S. 533, 540, 111 S.Ct. 922, 927, 112 L.Ed.2d 1140 (1991) (citing Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989)). Under Rule 11, "[a] signature certifies to the court that the signer has read the document, has conducted a reasonable inquiry into the facts and the law and is satisfied that the document is well grounded in both, and is acting without any improper motive." Business, 498 U.S. at 540, 111 S.Ct. at 927 (citing 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1335 (2d ed. 1990)). "'The certification requirement now mandates that all signers consider their behavior in terms of the duty they owe to the court system to conserve its resources and avoid unnecessary proceedings.'" Business, 498 U.S. at 542, 111 S.Ct. at 128 (quoting Wright & Miller, § 1331) (emphasis added by Supreme Court). To comply with these requirements, counsel must conduct a reasonable investigation of the facts and a normally competent

level of legal research to support the presentation. Mary Ann Pensierio, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (ad Cir. 1986). Rule 11 is aimed at curbing thee abuses of the judicial system. Business, 498 U.S. at 540, 11i S. Ct. at 927; Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 385, 107 S. Ct. 2447, 2450, 110 L. Ed.2d 359 (1990). The main purpose of the rule is not to award parties who have been victimized by vexatious litigation but rather to deter baseless filings and curb abuses. Business, 498 U.S. at 533, 111 S.Ct. at 929.

Rule 11 is governed by the objective reasonableness under the circumstances standard. Business, 498 U.S. at 532, 111 S.Ct. at 927; Pensierio, 847 F.2d at 94. The Third Circuit has explained that courts should "avoid using the wisdom of hindsight and should test the signer's conduct by inquiring into what was reasonable to believe at the time the pleading, motion or other paper was submitted." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (ad Cir. 1987) (citations and internal quotations omitted).

Determining whether an attorney has violated Rule 11 involves a consideration of three types of issues. First, the court must consider factual questions regarding the nature of the attorney's pre-filing inquiry and factual basis of the pleading or other paper. Second, legal issues are raised in considering whether a pleading is Warranted by existing law or a good faith argument" for changing the law and whether the attorney's conduct violated Rule 11. Third, the district court must exercise discretion to tailor an "appropriate sanction. "Cooter, 496 U.S. 394, 398, 110 S. Ct. at 2450.

The Third Circuit has identified five factors which should be considered in determining the reasonableness of an attorney's pre-filing inquiry: (1) the amount of time available to the signer for conducting the factual and legal

investigation; (2) the necessity for reliance on a client for underlying factual information; (3) the plausibility of the legal position advocated; (4) whether the case was referred to the signer by another member of the Bar; and (5) the complexity of the legal and factual issues implicated. Pensierio, 847 F.2d at 95. Standards for 12(b)(6) Pursuant to Fed. R. Civ. P. 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 828 F.2d 663, 664-65 (3d Cir. 1988) (quoting Estate of Bailey v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)).

III. Discussion

A. Counts 1, 2, and 4 are Time-Barred

In § 1983 actions, the applicable period of limitations is borrowed from the statute of limitations on personal injury actions of the state in which the alleged violations occurred. Wilson v. Garcia, 471 U.S. 261, 275, 105 S. Ct. 1938, 1946, 85 L.Ed. 2d 254, 266 (1985). The statute of limitations for a § 1983 claim arising in Pennsylvania is two years. Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876, 885 (3d Cir. 1991). A § 1983 cause of action accrues on the date when a plaintiff knew or should have known his or her rights had been violated. Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991). In Chardon v. Fernandez, a case involving an alleged politically-motivated dismissal of a nontenured administrator, the Supreme Court took pains to explain the

precise moment at which a § 1983 cause of action accrues: "[T]he proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful. The fact of termination is not itself an illegal act." Chardon v. Fernandez, 454 U.S. 6, 8, 102 S.Ct. 28, 29, 70 L.Ed. 2d 6 (1981) (citations omitted) (citing Delaware State College v. Ricks, 449 U.S. 250, 258, 259, 101 S.Ct. 498, 504, 66 L.Ed.2d 431, 441 (1980)).

In a case factually similar to the one at bar, Siblerud v. Colorado State Board of Agriculture, 896 F.Supp. 1506 (D. Colo. 1995), the court held that the injury allegedly suffered by plaintiff, a graduate student dismissed from Colorado State University for academic violations, accrued on the date on which the plaintiff had first received a letter notifying him of his dismissal. The court cited Ricks for the proposition that "[t]he grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made.' Id. at 1511 (quoting Ricks, 449 U.S. at 261, 101 S.Ct. at 506).

Here, the allegedly illegal act charged in Counts 1 and 2 was the denial of due process in the Law School's disciplinary proceedings and the sanctions issued at those proceedings. The alleged deprivation of due process and violations of Section 1232h occurred when Mr. Herbert first knew or should have known that he was deprived of his rights. Mr. Herbert knew that he was facing these sanctions when they were handed down by the Disciplinary Committee on October 17, 1994; Mr. Herbert's alleged injury thus occurred on October 17, 1994. The statute of limitations on Mr. Herbert's cause of action began to run on October 17, 1994; Mr. Herbert did not file his action until approximately two years and three months from the date his cause of action accrued. Therefore, Counts 1 and 2 are time-barred.

The portions of Count 4, which allege deprivations of

Mr. Herbert's First Amendment rights that occurred before January 18, 1995, are also time-barred. In Count 4, Mr. Herbert claims that his First Amendment rights were violated from September 1993 to January 1997. Clearly, any portion of Count 4 which is based on events that occurred before January 18, 1995 would be time-barred by the two-year statute of limitations for § 1983 claims. Plaintiff himself admits that his cause of action could not have accrued any later than January 18, 1995.

In an apparent attempt to save any claim that he may have had before January 18, 1995, plaintiff alleges that defendants committed continuing civil rights violations within the two-year period prior to his filing of this instant action, which purportedly works to reach back and bring the older time- barred claims within the statute of limitations. In his complaint, Mr. Herbert alleges that the defendants' actions constituted a "continuing course of conduct which violated [his] First Amendment Rights from September 1993 to January 1997." Presumably paragraphs 51-53 of Mr. Herbert's Amended Complaint are meant to establish that the statute of limitations on his claims from before January 18, 1995 is tolled by the doctrine of continuing violations."

This claim of continuing violations fails for two reasons. First, courts are generally wary of extending the doctrine to save claims arising outside of the employment discrimination area. LRL Properties v. Portage Metro Hous. Ruth., 55 F.3d 1097, 1106 n.3 (6th Cir. 1995) (quoting McGregor v. Louisiana State Univ. Bd. Of Supervisors, 3 F.3d 850, 866 (5th Cir. 1993)). Second, the events alleged in paragraphs 51-53 of Mr. Herbert's Amended Complaint are merely the continuing effects of his suspension handed down by the disciplinary panel. Since both this Court and the Third Circuit found those proceedings to be constitutional, Mr. Herbert cannot claim that the sanctions imposed by the panel on October 18, 1994 were unconstitutional. The only alleged

deprivation of First Amendment rights which occurred after January 18, 1995, was the exclusion of Mr. Herbert from Temple's campus. Since this was merely the ongoing effect of his constitutionally valid suspension from the Law School, it is insufficient to sustain Count 4. This finding would be true even if his initial suspension had been found constitutionally infirm. See Muniz-Cabrero v. Ruiz, 23 F.3d 607, 610 (1st Cir. 1994) ("A continuing violation is not stated if all that appears from the complaint is that the plaintiff continues to suffer from the ongoing effects of some past act of discrimination.").[2]

B. Counts 1, 3, and 4 Barred by Res Judicata and Collateral Estoppel

Count 1 is also barred by collateral estoppel, as it was actually litigated and was necessary to the determination of the first lawsuit. The fact that there was due process at the Law School's internal disciplinary proceedings was an important factor in determining damages in plaintiffs' first action against these same defendants.

Collateral estoppel requires that "a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

---

[2] The parties' disagreement about whether Rule 6(a) expands the statute of limitations is irrelevant. Since Mr. Herbert's complaint is based on events occurring before January 18, 1995, there is no need to address this issue.

In Burlington Northern R.R. Co. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1232 n.3 (3d Cir. 1995) (quoting Southern Pacific R.R. v. United States, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897)).

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether of the same or a different claim. 18 Moore's Federal Practice Digest § 132.01[2] (1997). A party cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first. Rather, the party bears the consequences of inadequate litigation by waiving the right to do so in a subsequent case. Id. at § 132.02[2][d]. "If the court in the former action assumed to adjudicate an issue or question not submitted by the parties in their pleadings nor drawn into controversy by them in the course of evidence, and bases its judgment on that adjudication, the judgment is not conclusive in a subsequent proceeding under the doctrine of collateral estoppel." Id. at § 132.03[2][c] (footnote omitted).

This Court specifically found that Mr. Herbert had received all process which he was due during the Law School's internal disciplinary proceedings. Mr. Herbert placed this matter into issue through his own introduction of evidence and testimony in at issue. Although the Third Circuit reversed this Court's Oct. 21, 1994 Order insofar as it found that Mr. Herbert was denied due process at the time of his initial suspension, the Third Circuit specifically instructed that:

> [T]he district court, even if it determines that the initial suspension was justified, should take into account that the denial of procedural due process should be

> actionable for nominal damages without proof of actual injury. However, we conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he is not entitled to injunctive relief. Furthermore, the court should, in considering damages, take into account that Herbert ultimately was suspended in procedurally proper hearings.
>
> Herbert v. Reinstein, No. 94-2138, slip. op. at 17-18 (3d. Cir. Oct. 6, 1995) (citation omitted).

This Court followed the Third Circuit's instructions by making the following finding of law:

> Herbert did not offer sufficient evidence demonstrating that any distress that he suffered was caused by the May 5, 1994, due process deprivation. Rather, the distress he described resulted from his ultimate suspension in October, 1994. Where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. Here, Herbert's claim for damages fails because Herbert did not set forth any injury stemming from procedural due process violation itself.
>
> Herbert v. Reinstein, No. CIV.A.94-5765, 1996 WL 84849, at *3 (E.D. Pa. Feb. 23, 1996) (citations omitted).

Thus, both this Court and the Third Circuit found that Mr. Herbert's suspension by the disciplinary committee was constitutional. This determination was integral to this Court's decision to only award Mr. Herbert one dollar in nominal damages. Therefore, this Court's decision in Mr. Herbert's earlier suit is preclusive of Count 1 of his Amended Complaint.

Res judicata is a broader doctrine than collateral estoppel. The Supreme Court in Cromwell v. County of Sac., defined res judicata this way:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.
>
> 94 U.S. 351, 352, 24 L.Ed. 195, 197-98 (1876).

Certainly, Mr. Herbert cannot claim that he would have been unable to allege the facts regarding First Amendment violations occurring from September 1993 to September 20, 1994, the date he filed his first suit. Mr. Herbert made similar pleadings, albeit insufficiently, in his first suit. Mr. Herbert explicitly chose not to appeal this finding to the Third Circuit and is now barred from

reasserting it in a second lawsuit.[3] His allegations of violations of his earlier lawsuit, and cannot now claim that the question of whether he received due process during the disciplinary proceedings was not First Amendment rights occurring subsequent to the filing of his first complaint are merely the results of the suspension which this Court and the Third Circuit both found to be constitutional. Thus, Count 4 is barred by the doctrine of res judicata.

In Count 3, Mr. Herbert alleges no facts regarding

---

[3] Indeed, the Third Circuit held:

> [Plaintiff] explicitly has chosen not to appeal certain issues, relying on this court to require another trial on the merits. In particular, the District Court dismissed Herbert's allegations of First Amendment violations, concluding that although Herbert made such allegations at trial, "he failed to sufficiently plead these claims in his Complaint." Findings of Fact and Conclusions of Law at 6 n.1. But Herbert chose explicitly not to appeal this issue. Br. At 3; Reply Br. At iv. Herbert's reliance on obtaining another trial is misplaced. Even if we were to require another trial on the merits, the District Court still would be faced with what it believed to be a complaint that inadequately pled First Amendment violations. Since Herbert waived explicitly this issue on appeal and neither party has briefed this issue, however, we decline to review it.

Plaintiff cannot now do what the Third Circuit has already held that he cannot do, that is, resurrect his First Amendment claim to try to obtain a new trial.

what constitutes the alleged breach of a covenant of good faith and fair dealing. Instead, he merely incorporates the allegations listed earlier in his Amended Complaint, in Counts 1 and 2. Since there was extensive testimony at his first trial and explicit findings of fact regarding alleged violations of his rights under the Fourteenth Amendment in this Court's Order, dated October 21, 1994, this claim is also barred, as Mr. Herbert could have brought it at his first trial.

C. Section 1232h Violation

Mr. Herbert's claim that the psychiatric sanctions imposed by the Law School violate 20 U.S.C. § 1232h is a question of prima impressionist To the Court's best knowledge, there have been no cases brought under 1232h, either alone or in conjunction with § 1983.

In Count 2, plaintiff claims that the imposition of a sanction by the Law School disciplinary panel requiring him to submit to a psychiatric evaluation and treatment, if treatment was recommended after the evaluation, violated 20 U.S.C. 1232h and 42 U.S.C. § 1983. Defendants claim that Mr. Herbert has no claim under § 1232h. Although defendants' argument is not entirely clear, it appears that defendants argue that plaintiff may not maintain an action under § 1983 and § 1232h because (1) § 232h does not provide a private right of action and (2) § 1983 does not provide a remedy for a violation of § 1232h.

To begin, this Court finds that it is irrelevant that § 1232h does not provide a private right of action because a right of private action may exist under § 1983 for the deprivation of a right even where there is no private right of action provided for within a statute. The Supreme Court has noted:

> [Whether a plaintiff may sue under § 1983 for the violation of a federal statute] is a different

> inquiry than that involved in determining whether a private right of action can be implied from a particular statute. In implied right of action cases, we employ the four-factor test to determine "whether Congress intended to create the private remedy asserted" for the violation of rights. The test reflects a concern grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because 1983 provides "an alternative source of express congressional authorization of private suits," these separation of powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.
>
> Wilder v. Virginia Hospital Association, 496 U.S. 498, 508 n.9, 110 S.Ct. 2510, 2516 n.9, 110 L.Ed.2d 455 (1990) (citations omitted).

Thus, the question before this Court is whether § 1983 provides a remedy to plaintiff for a violation of § 1232h.

Section 1983 provides a remedial device to enforce rights under the United States Constitution and federal law. U.S.C. § 1983. The only exceptions to this rule are (1) where the statute does not create an enforceable right within the meaning of § 1983 and (2) where Congress manifested in the statute itself an intent to foreclose its private enforcement.

such as when there is a statutorily created comprehensive remedial system that provided for private action and left no room for additional private remedies under § 1983. Farley v. Philadelphia Hous. Auth., 102 F.3d 697 (ad Cir. 1996). A court must analyze the relevant statutory provisions "in the light of the entire legislative enactment." Suter v. Artist M., 503 U.S. 347, 357, 112 S.Ct. 1360, 1366, 118 L.Ed.2d 1 (1992). The court must determine whether Congress intended the statutory provision to benefit the putative plaintiff. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106, 110 S. Ct. 444, 448, 107 L.Ed.2d 420 (1989). The language of the statute must be mandatory, not merely precatory. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 18, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981). Finally, the right may not be too vague and amorphous to be beyond the competence of the judiciary to enforce. Golden State, 493 U.S. at 106, 110 S.Ct. at 448.

After reviewing § 1232h, other related statutes and regulations, and the applicable case law, the Court finds that §1983 does not provide a right of action for Mr. Herbert because § 1232h was not intended to benefit Mr. Herbert, and thus it does create an enforceable right. See Golden State, 493 U.S. at 106, 110 S.Ct. at 448 (holding that § 1983 does not provide a cause of action for a putative plaintiff where the federal statute, which plaintiff claims was violated, was not intended to benefit plaintiff).

Section 1232h provides, in relevant part, that "[n]o student shall be required, as part of any applicable program, to submit to survey, analysis, or evaluation that reveals information concerning," inter alia, "mental or psychological problems embarrassing to the student or his family. . . without the prior consent of the student." 20 U.S.C. § 1232h (emphasis added). Mr. Herbert would appear to have a cause of action under Section 1232h if (1) the evaluation and examinations were "part of an applicable program" and (2)

the sanction requiring psychiatric exam and possible psychiatric counseling before returning to the Law School were the sort of examination or psychiatric treatment covered by the statute. Thus, as an initial matter, this Court must determine whether the phrase "as part of any applicable program" expresses a contemplation on Congress's part of a situation like Mr. Herbert's.

Section 1221 of the General Education's Provisions Act provides that an "applicable program" is "any program for which the Secretary or the Department [of Education] has administrative responsibility as provided by law or by delegation of authority pursuant to laws and "includes each program for which the Secretary or Department has administrative responsibility under the Department of Education Organization Act or under Federal law effective after May 4, 1980." 20 U.S.C. § 1221(c)(1); 34 C.F.R. § 98.4(c)(1). The text of this statute and the regulations implementing it indicate that Section 1232h was meant to apply, only to programs administered by the Secretary of Education.

Under the facts of this case, it is clear that Section 1232h was not intended to benefit Mr. Herbert because Mr. Herbert was not required to submit to a psychiatric evaluation and/or examination as part of any "applicable program." Indeed, defendant Temple states that it does not require any of its students, as part of any program, to submit to any type of psychological evaluation. Plaintiff simply fails to set forth any facts that would indicate he was required to submit to a psychological evaluation as part of his law school program. Instead, the facts in the Amended Complaint indicate that Mr. Herbert was required to submit to psychiatric evaluation and treatment as part of a disciplinary sanction, not as part of any "applicable program" within the meaning of §§ 1232h and 1221. Because Mr. Herbert was not required by Temple to submit to any psychological examination as part of any

"applicable program," plaintiff cannot claim an enforceable right under Section 1232h. As such, the Court finds that Mr. Herbert cannot establish a §1983 claim based on a violation of § 1232h.

D. Rule 11 Sanctions and/or 12(b)(6) Dismissal

In the first instance, defendants have moved for Rule 11 sanctions against plaintiff and plaintiff's counsel based on their bad faith conduct in litigating this action. After giving this issue considerable thought, the Court concludes that it would be inappropriate to impose Rule 11 sanctions in this case. While Mr. Herbert and his counsel may have been mistaken in arguing that each of his claims were not time-barred or barred by the doctrines of collateral estoppel or res judicata, the questions were sufficiently fine that they do not merit Rule 11 Sanctions. Further, given the dearth of authority interpreting § 1232h, and the lack of authority specifically precluding Mr. Herbert's interpretation, the Court cannot use its finding that § 1232h does not provide Mr. Herbert with a cause of action under § 1983 as grounds for imposing sanctions. Therefore, the Court denies defendants' motion for sanctions.

However, for the purposes of Rule 12(b)(6), it appears to a certainty that the statute of limitations, the doctrines of res judicata and collateral estoppel, and the inapplicability of § 1232h to the facts of this case do not permit Mr. Herbert to recover on any of claims in his Amended Complaint. Therefore, the Court grants defendants' motion in the alternative for dismissal pursuant to Rule 12(b)(6). Plaintiff's Amended Complaint and action is dismissed with prejudice as against all defendants.

An appropriate Order follows.

/s/ Newcomer
Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINCOLN J. HERBERT	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT J. REINSTEIN,	:	
et. al.	:	NO. 97-0457

O R D E R

AND NOW, this 22ND day of August, 1997, upon consideration of the following Motions, and any responses thereto, it is hereby ORDERED as follows:

1. The Motion of Defendants for Sanctions Pursuant to Federal Rule of Civil Procedure 11 is DENIED;

2. The Motion in the Alternative for Dismissal Pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED;

3. Plaintiff's Amended Complaint and action is hereby DISMISSED with prejudice as against all defendants; and

4. The Clerk of the Court shall CLOSE this case for statistical purposes.

AND IT IS SO ORDERED.

/s/ Newcomer
Clarence C. Newcomer, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1795

LINCOLN HERBERT,

Appellant

v.

ROBERT J. REINSTEIN, DEAN OF TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE-PRESIDENT OF TEMPLE UNIVERSITY; TEMPLE UNIVERSITY SCHOOL OF LAW; TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 97-cv-00457)

Submitted on May 22, 1998

Before BECKER, Chief Judge, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE and RENDELL, Circuit Judges

O R D E R

The petition for rehearing in banc filed by appellant, Lincoln Herbert, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Jane R. Roth
Circuit Judge

Dated: Sep. 17, 1998

DR/CC: RPM
CWH

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1795

LINCOLN HERBERT,

Appellant

v.

ROBERT J. REINSTEIN, DEAN OF TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE-PRESIDENT OF TEMPLE UNIVERSITY; TEMPLE UNIVERSITY SCHOOL OF LAW; TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-00457)
District Judge: Honorable Clarence C. Newcomer

Submitted under Third Circuit LAR 34.1(a)
Thursday, May 21, 1998

BEFORE: ROTH, McKEE and GARTH, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on Thursday, May 21, 1998.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the order of the district court dated August 22, 1997 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/ Bradford A. Baldus
Chief Deputy Clerk

DATED: June 5, 1998

Certified as a true copy and issued in lieu
of a formal mandate on September 25, 1998.

Teste: /s/ P. Douglas Sisk
Clerk, U.S. Court of Appeals
For the Third Circuit.

APPENDIX E

CODE OF STUDENT CONDUCT

TEMPLE UNIVERSITY SCHOOL OF LAW
CODE OF STUDENT CONDUCT AND
DISCIPLINARY PROCEDURES
AS ADOPTED 5/20/86
WITH AMENDMENTS THROUGH 8/31/90

I. GENERAL PROVISIONS

A. Jurisdictional Statement. This Temple University School of Law Code of Student Conduct and Disciplinary Procedures ("Code") governs law student conduct and proceedings regarding violations of this Code. This Code is intended to modify the general University Student Rights, Code of Conduct and Disciplinary Procedures and to supersede the general University Code and Procedures for TLS students.

. . .

II. STUDENT CONDUCT

It shall be a violation of this Code for a TLS student knowingly to do or to attempt to do or assist in any of the following:

A. give or secure information about an examination, except as authorized by the examining professor;

B. consult or copy from books, papers, or notes of any kind during an examination, except as authorized by the examining professor;

C. continue to write an examination when the

proctor has announced that the time allotted has elapsed;

D. plagiarize or use unauthorized materials in work submitted in any academic pursuit or Law School competition, including but not limited to, guided research or seminar papers, examinations, Law Quarterly, and Moot Court;

E. for a student taking a make-up exam, discussing the examination with a student who took the examination at any earlier time, and for a student who took an examination at the regularly scheduled time, discussing the examination with a student taking a make-up;

F. fail to report any violation of this Code about which the student has personal knowledge;

G. refuse otherwise to cooperate in any proceedings under the Code, including but not limited to failing to provide or providing false information, testimony, or other evidence during an investigation or hearing;

H. interfere or attempt to interfere with the appearance or testimony of any person before the Law School Discipline Committee;

I. misrepresent the student's academic achievement, record, or other activities in connection with seeking employment, financial aid, scholarly awards, acceptance into any program at an educational institution, or any other thing of value;

J. communicate to a member of the Faculty or Administration serious falsehoods concerning official business of the Law School, including the application process to obtain admission to the Law School;

K. ask for or receive any fee, compensation, or

other thing of value as remuneration from any client for whom the student rendered services as would be rendered by an attorney to a client, in connection with a Law School related activity;

L. carry on any activity on Law School property for personal profit, without the express written consent of the Dean of Students;

M. violate any Law School rule, regulation, or order duly promulgated by the Faculty or Dean and prominently posted, except when procedures and sanctions are already provided elsewhere with regard to the rule, regulation, or order.

N. violate any duly promulgated and prominently posted rule, regulation, or order of the University, applicable to the School of Law;

O. disclose his or her examination number to a Faculty member in violation of the anonymous grading system;

P. misappropriate or fail to account for any funds advanced to the student by the Law School;

Q. seriously and unreasonably disrupt, interfere with, or attempt to disrupt or interfere with the conduct of classes or any other normal or regular activities of the Law School;

R. commit any theft or robbery on Law School property; make any seriously intended threat of bodily harm or commit any act of physical violence or intimidation toward a member of the Law School community; or hide, destroy, or deface any Law School property, including Law Library materials;

S. be convicted of a crime that reflects adversely on the Student's trustworthiness, honesty, or fitness to be a lawyer in any other respects; and

T. engage in conduct, not otherwise covered by any other provision of the Code, involving dishonesty, fraud, deceit or misrepresentation with regard to activities or programs related to the Law School, which adversely reflect upon his or her fitness to remain a student at the Law School.

III. SANCTIONS

A. Upon determining that a student has violated the Code, the Law School Discipline Committee may impose as a sanction any regulation of the Student's connection with the University or Law School, including warning, reprimand, probation, exclusion from one or more Law School or University activities, suspension or permanent expulsion.

B. In addition, and irrespective of any other sanction, the Committee may notify the Registrar to enter a grade of "F" in any course involved in the violation, except that where the Committee determines that the Student gained an unfair advantage by continuing to write an examination after a proctor had announced that the time allotted had elapsed. The Committee may notify the Registrar to reduce by one (1) grade the grade assigned for the course involved or to enter administrative credit for the course involved.

C. Whatever sanction is imposed shall bear a reasonable relationship to the severity of the violation that the Committee has determined occurred, except that the Committee may also consider with regard to sanction the Student's background, including the Student's record of

prior violations or lack of violations.

IV. DISCIPLINARY PROCEDURES

D. Hearing Procedures.

. . .

(10) (a) At the conclusion of the hearing the Committee shall decide whether a violation has occurred. Except for a charge of violation of Section II.T., the Committee shall decide that a violation has occurred only if five (5) of the members, including any alternates who participated in the hearing, determine that a violation was proven by clear and convincing evidence. With regard to a charge of violation of Section II.T., the Committee shall decide that a violation has occurred only if the Committee members, including any alternates who participated in the hearing, unanimously determine that a violation was proven by clear and convincing evidence.

(b) If the Committee does not decide that a violation has occurred, the charge shall be dismissed with prejudice and no record of the charge or the proceeding shall be made or kept in the Student's file or transcript. The Committee Chairperson shall immediately notify the Student in writing of the dismissal.

(c) If the Committee decides that a violation has occurred, it shall support that decision by preparing in writing brief findings of fact and the application of the provisions of the TLS Code to these factual findings.

(11) (a) If the Committee decides that a violation has occurred, a second hearing shall be held before the same members and alternates on the issue of

sanction. This sanction hearing shall be held as soon as practicable after the determination of violation. Additional evidence and testimony regarding the occurrence of the violation shall not be presented at the sanction hearing, but either party may present evidence and testimony regarding the Student's background and character. Law School Counsel and the Student (or the Student's counsel or advisor) may also make brief argument on sanction.

(b) The Committee shall determine the sanction to be imposed by majority vote of the members and alternates participating in the hearing. The Committee shall promptly notify the Student and Law School Counsel of the sanction to be imposed.

(c) The Committee shall prepare a brief written report of its reasons for selecting the sanction to be imposed.

(12) Within seven (7) days after the conclusion of the hearings, the Committee shall forward to the Dean, Law School Counsel, and the Student copies of the Committee's written findings and applications and of its written report regarding the sanction.

(13) Procedural errors in any aspect of the proceedings shall not be grounds to dismiss the charges unless the Hearing Judge is convinced that the error would prevent the Student from ever obtaining a fair hearing or that there is a substantial likelihood that the outcome of the hearing would be different but for the error. The Hearing Judge shall prepare a written report in support of his or her determination only if the Student or Law School counsel file a Petition for Review of that determination under Section VI.

V. CONFIDENTIALITY, RECORDS, PUBLICITY AND FINALITY

A. All disciplinary procedures and proceedings any records thereof shall be confidential. A videotape recording shall be made of all proceedings at the violation and sanction hearings and shall be preserved for six (6) years. The deliberations of the Committee shall not be videotaped or recorded.

B. The Committee's written findings of fact and application of the TLS Code to the facts found and its written report regarding the sanction shall be maintained by the Committee with the Student's name deleted.

C. After the matter has become final the Dean shall carry out the decision of the Committee and shall post prominently throughout the Law School a notice stating the violation and sanction as determined by the Committee (and upheld upon review), with a brief summary of the facts supporting the violation and sanction sufficient to provide the Law School community reasonable notice of the nature of the violation.

D. A matter shall be considered final after the Committee has made its determination and the time for seeking review has passed without the filing of a Petition for Review or, if a Petition for Review was filed, after completion of the review process.

E. A record of any violation found and the sanction imposed, as well as the Committee's written findings and applications and its written report regarding sanction, shall be maintained in the Student's official Law School file. In addition, the Committee may direct the Registrar to note the violation and sanction on the Student's transcript.

VI. REVIEW

A. Law School Review Panel. There shall be a Law School Review Panel ("Review Panel") composed of five (5) Faculty members and four (4) student members, as follows:

(1) The Faculty members shall be the members of the Administrative and Academic Standing Committee.

(2) The student members shall be other than first year students and shall be appointed by the President of the Student Bar Association at the beginning of each TLS school year.

(3) The Chairperson of the Administrative and Academic Standing Committee shall be the Chairperson of the Review Panel.

B. Grounds for Review

(1) The Student may seek review on the following grounds:

(a) availability of new evidence;

(b) insufficiency of evidence presented to support the committee's determination that a violation occurred;

(c) imposition of excessive sanction; and

(d) procedural errors, rulings on challenges to Committee members or the Hearing Judge, and rulings at the hearing sufficient to require dismissal or a new hearing.

(2) Law School Counsel may seek review on the following grounds:

(a) imposition of inadequate sanction; and

(b) improper dismissal by Hearing Judge for procedural errors.

C. Standards of Review and Remedies.

(1) The Student shall be entitled to a new disciplinary hearing because of new evidence if the Student convinces the Review Panel that (a) the new evidence was not discovered until after the original hearing despite the exercise of reasonable diligence by the Student (and the Student's counsel or advisor) and (b) the new evidence would probably have caused the Committee to determine that no violation occurred had the new evidence been presented at the original hearing.

(2) The Student shall be entitled to a determination that no violation has occurred because of insufficient evidence to support the Committee's determination if the Review Panel concludes that, taking all the evidence presented at the hearing in the light most favorable to the Committee's determination and drawing from the evidence all the reasonable inferences that support the Committee's determination, no reasonable person could determine that a violation was proven by clear and convincing evidence.

(3) The Student shall be entitled to a dismissal of the charges if the Review Panel determines that the Hearing Judge's failure to dismiss for procedural errors under Section IV.D.(13) was clearly erroneous, unless the errors can be cured at a new hearing, in which event a new

hearing shall be held.

(4) The Student shall be entitled to a new hearing if the Review Panel determines that rulings to challenges of Committee members or the Hearing Judge or rulings and the hearing were clearly erroneous.

(5) Law School Counsel shall be entitled to reinstatement of charges that were dismissed by the Hearing Judge for procedural errors under Section IV.D.(13) if the Review Panel determines that the dismissal was clearly erroneous.

(6) The Review Panel may increase or decrease the sanction imposed by the Committee if six (6) members of the Review Panel determine that the sanction imposed was clearly inadequate or clearly excessive. The Review Panel shall give substantial deference to the sanction imposed by the Committee.

D. Procedures for Review.

(1) If either the Student or Law School Counsel seeks review, that party shall file a Petition for Review setting forth with particularity the grounds for review and the specific reasons asserted in support of those grounds. The Petition shall be filed with the Chairperson of the Review Panel within seven (7) days after receiving notice of the sanction imposed by the Committee or of a dismissal for procedural errors by the Hearing Judge.

(2) The Review Panel Chairperson shall schedule a meeting on the Petition as soon as is practicable and shall distribute to the Panel members copies of: (a) the Petition, (b) the Committee's written findings of fact and applications, (c) the Committee's written report regarding the sanction, and (d) the Hearing Judge's report in support

of his or her determination regarding procedural errors if the petition seeks review of that determination.

(3) Except when the Student asserts the availability of new evidence, review shall be based solely upon the videotaped record of the hearings, the Committee's written findings of fact and applications, the Committee's written report regarding the sanction, the Hearing Judge's written report regarding procedural errors, and the presentations of the parties.

(4) The videotaped record of the hearings need not be shown at the Review Panel meeting. The record shall be available in advance of the meeting for viewing by Panel members.

(5) Presentations by the parties shall be made in writing, unless the Review Panel permits oral presentations.

(a) A copy of each written presentation shall be distributed to each Review Panel member at least three (3) days in advance of the meeting.

(b) If oral presentations are permitted, the parties shall each have fifteen (15) minutes for oral presentation.

(c) Even if oral presentations are not permitted, the parties and the Committee shall be available at the time of the meeting for questioning by Review Panel.

(6) The Review Panel shall only consider those grounds and those reasons asserted in support of these grounds that were set forth with particularity in the Petition for Review.

(7) The Review Panel shall promptly notify the Dean, Law School Counsel, the Student, and the Committee Chairperson of its determination. Except as provided below, the Panel's determination shall be final and not subject to review by the plenary Faculty.

(a) If the Panel's determination is that the student is entitled to a new hearing or that the Hearing Judge improperly dismissed the charges, the Committee Chairperson shall schedule a hearing as soon as practicable and the matter shall proceed as provided in this Code.

(b) If the Panel's determination is that the evidence was insufficient to support the Committee's determination that a violation occurred or that the charge should be dismissed for procedural errors, the charge shall be dismissed with prejudice, and no record of the charge or the proceedings shall be made or kept in the Student's file or transcript.

(c) If the sanction imposed by the Committee and upheld by the Panel or imposed by the Panel is either suspension or permanent expulsion of the Student, the sanction shall be automatically reviewed by the plenary Faculty.

(d) Otherwise, the Panel's determination shall be final and the Dean shall thereafter carry out that determination.

(8) Faculty Review of Suspension or Expulsion

(a) When a sanction of suspension or expulsion is imposed by the Committee and upheld by the Review Panel or is imposed by the Review Panel, the matter shall be placed on the agenda for the next regularly scheduled Faculty meeting after the Review Panel's determination.

(b) The plenary Faculty may decrease the sanction only if the decrease is approved by a three-fifths (3/5) vote of the Faculty members present.

(c) Review of the sanction shall be based solely upon the videotaped record of the hearings, the Committee's written findings of fact and applications, the Committee's written report regarding the sanction, a written report by the Review Panel regarding sanctions, and the presentations of the parties. The Faculty shall give substantial deference to the sanction imposed by the Committee and/or Review Panel.

(d) The videotaped record of the hearings shall not be shown, except for good cause, at the Faculty meeting when the sanction is reviewed. The record shall be available in advance of the meeting for viewing by Faculty members and they are encouraged to view the record.

(e) Presentations by Law School Counsel and the Student may be made in writing, or orally, or both. A copy of each written presentation shall be distributed to each Faculty member at least three (3) days in advance of the meeting. If oral presentations are made, the parties shall each have fifteen (15) minutes for oral presentation. Reasonable limitations may be imposed on questioning of the parties and discussion by individual Faculty members.

. . .

APPENDIX F

Temple University School of Law
Report of the Law School
Discipline Committee

Pursuant to Article IV of the Code of Student Conduct, a panel of the Law School Discipline Committee, consisting of four student members and three faculty members, was convened on Monday, October 4, 1994, for the purpose of hearing charges with violating two paragraphs of Article II of the Code of Student Conduct which provides that "It shall be a violation of this code for a TLS student knowingly to do or to attempt to do or to assist in any of the following:

> J. communicate to a member of the Faculty or Administration serious falsehoods concerning official business of the Law School,....
>
> R. ....make any seriously intended threat of bodily harm or commit any act of physical violence or intimidation toward a member of the Law School community;...."

Pursuant to Paragraph D(10)(a) of Article IV of the Code of Student Conduct, which provides that, "....the Committee shall decide that a violation has occurred only if five (5) of the members.....determine that a violation was proven by clear and convincing evidence", the panel announced after deliberation the following decisions:

On the charge of violating Paragraph J of Article II: **Guilty**.

On the charge of violating Paragraph R of Article II: **Not Guilty**.

With regard to the finding of a violation of Paragraph J of Article II, the panel made the following findings of fact: On May 5, 1994, in response to the invitation of Dean Reinstein to explain an incident which occurred two days earlier, the law student told the Dean that the person he sprayed with pepper gas has stated to him (the law student) that he had a knife and reached inside his jacket in a manner indicating that there was a knife. Clear and convincing evidence was introduced that no statement about a knife was made to the law student, and no gesture of reaching inside his jacket was made by the man sprayed by the law student which could reasonably have indicated that there was a knife. There was in fact no knife. The false statements were serious. The Dean's attempt to ascertain the facts of the May 3 incident constituted official business of the Law School.

Pursuant to Paragraph D(11) of Article IV of the Code of Student Conduct, a second hearing was convened on Monday, October 10, and continued on Monday, October 17, 1994, at the conclusion of which the panel by majority vote determined the sanction to be imposed. The panel voted that the law student should be suspended from the Law School until January, 1997, and that to re-enter the Law School at that time, the law student must comply with the following conditions: 1. During his suspension, the law student must obtain weekly professional psychological counseling totalling not less than 100 hours, not at the expense of the Law School or Temple University. 2. During his suspension, the law student must perform not less than 100 hours of community service, appropriate service to be determined jointly by the law student and the most senior member of the Law School

faculty or his designee. 3. Upon his return to the Law School, the law student will remain on probation for as long as he remains a law student.

In deciding on the appropriate sanction, the panel considered the factual circumstances of the violation, the self-serving nature of the violation, the seriousness of the violation by an aspiring lawyer, and the character of the law student as described by witnesses presented by counsel for the Law School and for the law student. The panel considered that this is the law student's first violation of the code of Student Conduct.

Respectfully submitted, pursuant to paragraphs D(10)-(12) of Article IV of the Code of Student Conduct.

/s/ Jan C. Ting

Jan C. Ting,
Professor of Law
and Acting Chairperson,
Law School Discipline Committee

Thursday, October 20, 1994

APPENDIX G

Temple University Law School
Law School Review Panel

IN THE MATTER OF LINCOLN HERBERT

REPORT

1. On October 31, 1994, Lincoln Herbert filed a Petition for Review of a finding by the Law School Discipline Committee ("Committee") that he had violated Article II.J. of the Law School Code of Student Conduct ("Code") and of a penalty imposed upon him as a result of such a finding.

2. October 31, 1994, Professor David Sonenshein, on behalf of Temple Law School, filed a Petition for Review of the Committee's sanction upon Mr. Herbert.

3. The Law School Review Panel ("Panel") has received and reviewed the following documents:

a. Report of Law School Discipline Committee

b. Opinion of the Hearing Judge

c. Videotaped transcripts of the hearings below

d. Petition for Review of Lincoln Herbert

e. Petition for Review of Temple Law School

f. Law School Response to Herbert Petition for

Review (with Exhibits)

g. Motion by Lincoln Herbert Requesting Recusal of Panel Members

h. Amended Petition for Review by Lincoln Herbert (with 20 Exhibits)

i. Written Submission of Temple Law School

j. Memorandum of Law of Lincoln Herbert

k. Letter/Motion of Lincoln Herbert Regarding Certain Procedural Matters

4. On December 2, 1994, the Panel held the meeting required by Section VI.D.(2) of the Code. At that meeting, both Mr. Herbert and Professor David Sonenshein made oral presentations in accordance with Section VI.D.(5) of the Code.

5. The Panel, having considered the documents described above and the oral presentations of the parties to this matter, determines as follows with regard to the Petition for Review of Lincoln Herbert:

(a) The Code Section VI.B(1)(a) grounds for review alleged by Mr. Herbert (availability of new evidence) do not meet the standard for review required by Code Section VI.C(1).

(b) The Code Section VI.B(1)(b) grounds for review alleged by Mr. Herbert (insufficiency of evidence) do not meet the standard of review required by Code Section VI.C(2).

(c) The Code Section VI.B(1)(d) grounds for

review alleged by Mr. Herbert (procedural errors) do not meet the standard of review required by Code Section VI.C(3).

(d) The issue of whether Mr. Herbert's counsel at the proceedings below was ineffective is not properly before us as a ground for review.

Accordingly, Mr. Herbert's Petition with regard to the above cited grounds is Denied.

(e) With regard the Code Section VI.B(1)(c) grounds for review alleged by Mr. Herbert (excessive sanction), we find that the sanction of 100 hours of psychiatric treatment imposed by the Committee is clearly excessive. Accordingly, it is struck and replaced by the following:

> "By March 1, 1995, Mr. Herbert must obtain, at his own expense, a psychiatric evaluation from a duly licensed psychiatrist. As a condition of reinstatement from his suspension, Mr. Herbert must satisfy the Administrative Committee that he has obtained said evaluation and has followed or is following the treatment recommendations, if any, set forth in such an evaluation."

To this extent, Mr. Herbert's Petition for Review with regard to the above cited grounds is Granted.

With regard to the remaining sanctions imposed by the Committee (suspension, community service and probation upon reinstatement) we find that they bear a reasonable relationship to the severity of the violation and were not clearly inadequate or clearly excessive.

Accordingly, Mr. Herbert's Petition for Review is Denied with regard to the remaining sanctions imposed by the Committee.

6. In view of the findings set forth in paragraph 6(e) of this Report, the Law School's Petition for Review is Denied.

7. In accordance with the Code, this concludes the Panel's proceedings in this matter.

FOR THE LAW SCHOOL REVIEW PANEL:

/s/ Rafael A. Porrata-Doria, Jr.

Rafael A. Porrata-Doria, Jr.
Professor of Law
Chair, Law School Review Panel

APPENDIX H

ANDERSON
1150 Warwick Furnace Road
Glenmoore, PA 19343
(610) 469-8636

March 22, 1997

Mr. Richard P. Myers, Esquire
Paul Reich & Myers, PC
1608 Walnut Street, Suite 500
Philadelphia, PA 19103

Dear Mr. Myers,

On Mach 21, 1997 your client Lincoln F. Herbert was interviewed and tested with the polygraph. At issue was Mr. Herbert's use of pepper gas on May 3, 1994 and a subsequent interview on May 5, 1994 by Dean Reinstein of the Temple Law School.

During the polygraph process these issue questions were asked of Herbert. (Answer in parenthesis.)

1. Did the man who accosted you May 3, 1994 outside the Temple Law School tell you he had a knife? (yes)

2. Did the man who accosted you May 3, 1994 outside the Temple Law School reach inside his jacket in manner suggesting he had a knife? (Yes)

3. Did you purposefully lie to Dean Reinstein May 5, 1994 by telling him the man who accosted you said he had a knife? (No)

4. Did you purposefully lie to Dean Reinstein May 5, 1994 by telling him the man who accosted you reached inside his jacket in a manner which suggested yo you he had a knife? (No)

The emotional responses recorded as Herbert answered these issue questions were compared to those recorded as he answered certain control questions. These controls were derived by me from the pre-test interview and my own experience. Based on this comparison it is my opinion Herbert was not deceptive (was truthful) when he answered the above issue questions as he did.

The charts produced along with the related papers are here retained in the attorney-client privilege as agreed. They are available for display and explanation by me at your direction. A copy of my resume is attached.

Very truly yours,

\s\ William B. Anderson
William B. Anderson

APPENDIX I

ROBERT V. DE SILVERIO
Suite 2109, Oakwood at the Windsor
1700 Benjamin Franklin Parkway
Philadelphia, Pennsylvania 19103

Telephone (215) 636-9005
Fax (215) 636-9017

November 2, 1996

School of Law
Temple University
Philadelphia, PA

Re: Lincoln Herbert

I conducted a psychiatric examination of Mr. Herbert on March 10, 1995. He informed me that he had been suspended as a student at the law school and was requresting the examination in compliance with a directive from the school as one of the conditions for reinstatement.

Mr. Herbert, 37, was in his third year at the law school and when he receive a 2-½ year suspension after being found guiltiy of having lied to the law school dean in regard to circumstances surrounding an incident on campus, on May 3, 1994.

In regard to the incident, Mr. Herbert said that he was returning to the law school after dark and was approached from behind on the school steps by a man demanding money. He said he did not respond and when the man told him he had a knife, reached under his jacket and rushed toward him, he sprayed him with pepper gas, stunning him. Mr. Herbert then said he went into the building and asked a security guard to call campus police. He went on to relate

that the man then appeared inside the building shouting obscenities and threatening him and he sprayed him again, after which the man fled. Mr. Herbert said he subsequently gave statements to both the campus police and the Philadelphia Police.

Mr. Herbert said that two days later the law school dean suspended him from school and explained the apparent breach in due process of the basis of his judgment that Mr. Herbert was a "clear and present danger" to the law school community. Some 47 days later, he was charged with knowingly committing an act of violence (a law school clerk was said to have been affected by lingering pepper spray) and lying about having been accosted and threatened.

Mr. Herbert said that he was subsequently acquitted, by a disciplinary committee, of the charge of violence but was found guilty of lying to the dean about the circumstances of the incident.

Mr. Herbert said that in the weeks precedeing the incident, the dean had been demeaning him and a student group, Western Heritage Society, a conservative campus organization which he founded and was president of, at the time. In this connection he siad the dean wrot a "letter to the law school community" in which he denounced Mr. Herbert and the organization, based on a speech Mr. Herbert had written. The letter, he said, was later published int he student publication, "Class Action" but Mr. Herbert was denied an opportunity to submit a response. The group was said to be vilified because of its position against "political correctness" on campus.

A month earlier, Mr. Herbert was honored with a student activism award presented to him at a Harvard University conference on "The First Amendment and the Western

Tradition" in which he was an invited panelist.

Personal History:

Mr. Herbert is the oldest of four children raised in Milwaukee, WI, whose parents separated [sic] he was 19. His sister, 34 is an elementary school teacher. His brother 33, obtained a master's degree in journalism from Columbia University in 1994 and was hired by a newspaper in Johannesburg, South Africa, the following year. His brother. 31 is an attorney who graduated from the Southern Illinois Law School in 1991. Mr. Herbert graduated from high school at age 16. He then attended DuPage University as a pre-medical major, for 2 years after which he transferred to U.C.L.A. as a history major. He completed his courses in 1984 and was awarded a B.A. in 1987. He spent his senior year at the University of London Modern European History and German. After completing college he taught English in Germany for 5 years. He began Temple University School of Law in 1991 and completed 2 years full time and 1 year part-time. He explained that the change to part-time was necessitated for financial reasons. He said he had anticipated completing law school in 1995.

Family history was negative for psychiatric illness.

Mental Status Examination:

Mr. Herbert appeared neatly groomed and attired. Speech was logical and coherent. He manifested no mood disturbance, hallucinations or delusions. Fund of knowledge was consistent with intellectual ability in the well above average range. Ability for abstract thinking was unimpaired.

In conclusion, Mr. Herbert manifested no clinical evidence of mental illness. Moreover, no basis was found for the

requirement of a psychiatric examination, which appeared inconsistent with having been found guilty of an offense. If he was seriously thought to have had a psychiatric disturbance at the time of the offense, it seems unfair that he was not informed of it so that, at the very least, he would have had an opportunity to consider offering a psychiatric defense.

Sincerely,

/s/ Robert V. De Silverio, M.D.

Supreme Court, U.S.
FILED
JAN 29 1999

No. 98-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LINCOLN HERBERT,

Petitioner,

vs.

ROBERT J. REINSTEIN, DEAN, TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE PRESIDENT OF TEMPLE UNIVERSITY, TEMPLE UNIVERSITY SCHOOL OF LAW AND TEMPLE UNIVERSITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:

GEORGE E. MOORE
University Counsel
Temple University
435 Carnell Hall
Broad St. & Montgomery Ave.
Philadelphia, Pennsylvania 19122
(215) 204-6542

CARL W. HITTINGER
Counsel of Record
DONALD E. WIEAND, JR.
STEVENS & LEE, P.C.
1818 Market Street
14th Floor
Philadelphia, Pennsylvania 19103
(215) 751-1946

Attorneys for Respondents

150949

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

7298

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. The Petition Misrepresents The Procedural History Of This Case.	1
Reasons for Denying the Writ	5
I. The Third Circuit Correctly Applied *Ricks* And *Chardon* To The Facts Of This Case.	5
II. There Is No Split In The Circuit Courts Of Appeal As To The Accrual Date Of A Civil Rights Claim In An Employment Or Tenure Case Under *Ricks* And *Chardon*.	8
III. Petitioner's Claim Concerning His Psychiatric Examination Is Time-Barred And Is Constitutionally Unsupported.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Addington v. Texas, 441 U.S. 418 (1979) 14

Blackwell, Inc. d/b/a Kuka's Place v. Fisher, 1993 U.S. App. LEXIS 29295 (6th Cir. 1993) 11, 12

Chardon v. Fernandez, 454 U.S. 6 (1981) 5, 8

Delaware State College v. Ricks, 449 U.S. 250 (1980) 5, 7, 8, 9, 10, 11, 12

Dunleavy v. Local 1617, United Steelworkers of America, 814 F.2d 1087 (6th Cir. 1987) 12

Fobbs v. Holy Cross Health System Corp., 29 F.3d 1439 (9th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995) 9, 10

Goss v. Lopez, 419 U.S. 565 (1975) 2

Harris v. Ladner, 127 F.3d 1121 (D.C. Cir. 1997) ... 8, 9

Lever v. Northwestern University, 979 F.2d 552 (7th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993) 10

McCoy v. San Francisco, 14 F.3d 28 (9th Cir. 1994) . 9, 10

Morse v. University of Vermont, 973 F.2d 122 (2d Cir. 1992) 11

O'Malley v. GTE Serv. Corp., 758 F.2d 818 (2d Cir. 1985) 11

Cited Authorities

	Page
Statutes:	
20 U.S.C. § 1232(h)	4
29 U.S.C. § 411, *et seq.*	12
42 U.S.C. § 1981	10
42 U.S.C. § 1983	1
United States Constitution:	
First Amendment	1, 3, 4
Fourteenth Amendment	1, 4
Rules:	
Federal Rule of Appellate Procedure 10(a)	13
Federal Rule of Appellate Procedure 28(g)	3
Federal Rule of Civil Procedure 11	4
Federal Rule of Civil Procedure 12(b)(6)	4

APPENDIX

Page

Appendix A — Findings Of Fact And Conclusions Of Law And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated October 20, 1994 And Filed October 21, 1994 .... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Third Circuit Dated October 6, 1995 ..... 13a

Appendix C — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated February 23, 1996 And Entered And Filed February 26, 1996 ..... 37a

Appendix D — Order Of The United States Court Of Appeals For The Third Circuit Dated May 30, 1997 ..... 47a

Appendix E — Order Of The United States Court Of Appeals For The Third Circuit Dated July 3, 1997 . 48a

Appendix F — Order Of The United States Court Of Appeals For The Third Circuit Dated August 11, 1997 ..... 50a

Appendix G — Order Of The United States District Court For The Eastern District Of Pennsylvania Dated And Filed February 7, 1997 And Entered February 10, 1997 ..... 52a

STATEMENT OF THE CASE

A. The Petition Misrepresents The Procedural History Of This Case.

The Petition seeks this Court's review of the Third Circuit's unpublished opinion affirming the district court's dismissal of Petitioner's amended complaint, in which he alleged that Respondents, Temple University, Temple School of Law, and Dean Robert J. Reinstein, violated his civil rights and breached a contract with him.

Despite Petitioner's passing reference (Petition at 5 n.1), the instant case represents Petitioner's second lawsuit against Respondents arising from the same factual background. In his first lawsuit, filed September 20, 1994 in the United States District Court for the Eastern District of Pennsylvania, Case No. 94-5765, Petitioner filed a *pro se* complaint and a motion for a temporary restraining order. Petitioner sought to compel Respondents to reinstate him as a law student at Temple School of Law pending the outcome of an internal disciplinary proceeding against him after his temporary suspension by Dean Reinstein in May of 1994 for engaging in violent and deceitful conduct. Petitioner brought claims under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, alleging a denial of due process, free speech, and free association rights.

In the first action, District Court Judge Clarence A. Newcomer denied Petitioner's request for a temporary restraining order and consolidated his request for a preliminary injunction with a trial on the merits. The Disciplinary Committee of the Law School held its internal hearing in October, 1994 and found Petitioner violated the Code of Student Conduct and ordered him suspended for over two years. At the

At the trial on the merits in the district court, Petitioner, then represented by counsel, requested and was granted leave to challenge not only the constitutionality of his May, 1994 temporary suspension by the Dean but also the suspension decision of the Disciplinary Committee. After a full evidentiary hearing, the district court entered judgment in favor of Respondents.

The district court found that Dean Reinstein was fully justified in suspending Petitioner temporarily, pending a formal disciplinary investigation, because it was reasonable for the Dean to conclude that Petitioner posed a "clear and present danger" under *Goss v. Lopez*, 419 U.S. 565 (1975). App. A to Respondents' Brief in Opposition (hereinafter "Opposition") at 9a. The district court also found that the later decision of the Disciplinary Committee was constitutionally valid and "that Mr. Herbert received all process that he was due at the formal hearing before the student panel." App. A to Opposition at 10a.

Petitioner appealed the district court's decision on both issues to the Court of Appeals for the Third Circuit. A majority of the Third Circuit affirmed the denial of injunctive relief but found, *sua sponte*, that Dean Reinstein should have informed Petitioner that his prior incidents of violent behavior had influenced the Dean's decision in May, 1994 to suspend Petitioner temporarily. App. B to Opposition at 26a-27a.[1]

The Court of Appeals unanimously affirmed the district court's finding that the Disciplinary Committee's decision was

---

1. Circuit Judge Stapleton dissented finding that the scope of notice decided by the majority was not required under *Goss* and failed to strike a reasonable balance between the needs of law student Herbert and the security needs of the Law School community. App. B to Opposition at 33a-34a.

constitutionally valid and that Petitioner was provided with all the process he was due: "However, we conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he is not entitled to injunctive relief." App. B to Opposition at 28a. The Third Circuit also found that Petitioner's failure to raise his First Amendment claim on appeal was fatal to that claim. App. B to Opposition at 29a-30a.

On remand from the Court of Appeals, the district court held a damage hearing and awarded Petitioner $1.00 in nominal damages. App. C to Opposition at 45a-46a.

Petitioner appealed the district court's damage award, but his appeal was dismissed by the Clerk of Court on May 30, 1997 for failure to file a brief in accordance with Rule of Appellate Procedure 28(g). App. D to Opposition at 47a. Petitioner's motion to set aside the Clerk's Order dismissing his appeal was denied by the Third Circuit, as was his motion for reconsideration. App. E and F to Opposition at 48a-51a.

On January 21, 1997, while his appeal to the Third Circuit from the district court's damage award was still pending, Petitioner, then represented by new counsel, filed a second action in the district court.[2] In this new action, Petitioner again challenged the decision of the Disciplinary Committee, which the district court and Third Circuit had already found was constitutionally valid.

Respondents filed a motion for sanctions on the basis that Petitioner was pursuing claims that were time-barred, had been

---

2. Counsel did not mark the second filed case related to the first case before Judge Newcomer. Upon notification by Respondents, the Chief Judge reassigned the second case to Judge Newcomer. App. G to Opposition at 52a.

litigated previously, and were legally and factually baseless.[3] Alternatively, Respondents sought dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, *inter alia*, that Petitioner's claims were time-barred by the applicable two-year statute of limitations and that the civil rights claims were barred by the doctrines of *res judicata* and/or collateral estoppel.

The district court denied Respondents' motion for sanctions but granted their motion to dismiss all counts of Petitioner's amended complaint, ruling that all of Petitioner's civil rights claims were barred by the statute of limitations. The district court also held that Petitioner's due process claims concerning his suspension and the disciplinary proceedings, his contract claim based upon a breach of a covenant of good faith and dealing, and his First Amendment claim were barred by collateral estoppel and/or *res judicata*. The district court held that Petitioner's contract claim failed to allege any specific facts to support a breach of good faith and dealing and that Petitioner's claim under the Fourteenth Amendment and 20 U.S.C. § 1232(h), relating to the imposition of a psychiatric examination as a condition of his readmission to the Law School, was time-barred and otherwise not actionable as a matter of law. App. B to Petition at 18a, 25a-29a.

On appeal, the Third Circuit unanimously affirmed the district court's decision, holding that the applicable statute of limitations barred all of Petitioner's civil rights claims and that

---

3. In addition to Respondents, Petitioner also sued numerous other individuals associated with Temple University and the Temple Law School, including the attorneys who had defended Respondents in the first action. When counsel for the defendants filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11, Petitioner's counsel filed an amended complaint dropping all defendants except Respondents, Temple University, Temple Law School and Dean Reinstein. App. B to Petition at 13a.

the doctrine of *res judicata* barred Petitioner's breach of contract claim. The Court declined to address the issues of collateral estoppel and *res judicata* as applied to Petitioner's civil rights claims. App. A to Petition at 7a.

On September 17, 1998, the Third Circuit denied Petitioner's petition for rehearing *in banc*. App. C to Petition at 32a.

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT CORRECTLY APPLIED *RICKS* AND *CHARDON* TO THE FACTS OF THIS CASE.

The Third Circuit correctly decided that Petitioner's civil rights claims were time-barred pursuant to *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *Chardon v. Fernandez*, 454 U.S. 6 (1981). The Third Circuit held that the applicable two-year statute of limitations commenced on October 17, 1994, the date when the Disciplinary Committee of the Law School issued its final decision suspending Petitioner:

> Courts consistently have rejected the argument that Herbert advances in this appeal; namely, that pursuit of some internal appeal should toll the statute of limitations. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) (holding that initiation of grievance procedure did not toll accrual date on claim); *Soignier [v. American Brd. of Plastic Surgery*, 92 F.3d 547, 553 (7th Cir. 1996)] (holding that employee's pursuit of internal grievance procedure does not affect accrual date); *Morse v.*

> *University of Vermont*, 973 F.2d 122 (2d Cir. 1992) ("an internal administrative review of [an] allegedly discriminatory decision has no effect on when the statute of limitations period begins to run") . . . Accordingly, we conclude that Herbert's claims arising in Counts 1, 2 and 4 of his amended complaint accrued on October 17, 1994 — the date the disciplinary committee meted out its sanctions and thus the date that Herbert was aware of should have been aware of his alleged injuries. Thus, the district court properly applied the appropriate limitations period with respect to Counts 1, 2 and 4.

App. A. to Petition at 6a-7a.

Petitioner challenges that holding by arguing that the Disciplinary Committee's decision was not "final" claiming that the decision was automatically reviewable by the Plenary Faculty. Petitioner's assertion is incorrect for two reasons. First, the Disciplinary Committee's decision as to the sanctions imposed under the Code of Student Conduct was final unless Petitioner filed an internal appeal of that finding to the Faculty Review Panel and again to the Plenary Faculty. Therefore, if Petitioner had not filed an internal appeal, the Disciplinary Committee's decision on sanctions would have been final without any further action. *See* App. E to Petition at 41a ("A matter shall be considered final after the Committee has made its determination and the time for seeking review has passed without the filing of a Petition for Review, or, if a Petition for Review was filed, after completion of the review process.").

Second, contrary to Petitioner's implication, the Plenary Faculty was without authority under the Code of Student Conduct to review the Disciplinary Committee's decision on

the merits as to the issue of guilt or innocence. It was only authorized to review the sanctions imposed. *See* App. E to Petition at 46a-47a ("The Plenary Faculty may decrease the sanction only if the decrease is approved by a three-fifths (3/5) vote of the Faculty members present.").

Therefore, the subsequent review process outlined in the Law School's Code of Student Conduct is precisely the type of internal appeal or grievance procedure which this Court held in *Ricks* did not affect the commencement of the statute of limitations: "The grievance procedure, by its nature, is a remedy, for a prior decision, not an opportunity to influence that decision before it is made." 449 U.S. at 261.

Petitioner clearly understood this Court's ruling in *Ricks* because he challenged the decision of the Disciplinary Committee in the first action and then unsuccessfully appealed that issue to the Third Circuit. Indeed, if the Disciplinary Committee's decision was not final and had no legal effect until further action was taken, as Petitioner's new counsel now argues, then why did Petitioner's prior counsel challenge that same decision in the first action? In the first action, the district court found, and the Third Circuit affirmed, that Petitioner obtained all the process he was due through and including the October, 1994 Disciplinary Committee's decision on his suspension. App. B to Petition at 12a-13a.[4]

Accordingly, this case hardly supports Petitioner's argument that there has been uncertainty created as to when to file a civil rights action in the wake of this Court's decision in

---

4. Therefore, the district court properly found in the second action under the doctrine of *res judicata*, and the Third Circuit did not disturb, that all but one of the claims raised in the second action challenging the Disciplinary Committee's decision, and the related sanctions, were or could have been raised in the first action. App. B to Petition at 20a-25a.

Ricks. Petition at 11. The facts of this case show that the Third Circuit correctly applied this Court's clear decision in *Ricks*.

II.

THERE IS NO SPLIT IN THE CIRCUIT COURTS OF APPEAL AS TO THE ACCRUAL DATE OF A CIVIL RIGHTS CLAIM IN AN EMPLOYMENT OR TENURE CASE UNDER *RICKS* AND *CHARDON*.

Contrary to the Petition's assertion, all Circuit Courts of Appeal have held, consistent with *Ricks* and *Chardon*, that a civil rights action accrues in an employment context when the employer's alleged discriminatory decision is made and the plaintiff is notified of the decision. Any internal grievance procedure to review the discriminatory decision does not delay the start of the limitations.

The Petition asserts that in applying this Court's decision in *Ricks*, some Circuits' focus upon the finality of a decision is inconsistent with other Circuits' focus on notice of the decision to the plaintiff. However, under *Ricks* and *Chardon*, these concepts are not mutually exclusive. Both a final, non-tentative decision *and* notice to the plaintiff are required to trigger the statute of limitations. *Ricks*, 449 U.S. at 259; *Chardon*, 454 U.S. at 12. That some cases cited by Petitioner focus on the date of the employer's decision while other cases focus on the date when the plaintiff was notified of that decision does not render those cases inconsistent or incompatible.

For example, in *Harris v. Ladner*, 127 F.3d 1121 (D.C. Cir. 1997), a case cited by Petitioner, the Court of Appeals for the District of Columbia Circuit was confronted with the issue of which decision among multiple administrative levels in a tenure application process was the non-tentative decision which

triggered the statute of limitations. The Court held that where a university had both a reconsideration process and a grievance process to review tenure decisions, which processes were separate and distinct from each other, it was reasonable for the plaintiff to believe that the reconsideration process was a continuation of the original application for tenure process and that the initial departmental committee decision to deny her tenure application was merely tentative. 127 F.3d at 1124-1125.

In deciding that plaintiff's claim accrued when she received the notification from the Dean of the College, the Circuit Court in *Harris* distinguished *Ricks* by correctly noting that the university's reconsideration process there may not have been a grievance or some other method of collateral review but rather may have been a continuation of the original application process. *Id.* at 1124-1125. The Court of Appeals held, citing *Ricks*, that the grievance procedure there, unlike here, came into play only after the final decision was made as part of the reconsideration process. *Id.* at 1125.

The decision of the Ninth Circuit cited by Petitioner is likewise consistent with *Ricks* and not at odds with decisions of other Circuit Courts of Appeal. *McCoy v. San Francisco*, 14 F.3d 28 (9th Cir. 1994), merely involved the question of whether a plaintiff's claim accrued on the date that an oral disciplinary decision was issued by a police commission or the date when the written decision was subsequently issued. That case did not involve multiple layers of review or appeal nor did the case involve the exhaustion of administrative remedies. The Court of Appeals noted that it was not until the written decision was issued that the plaintiff's defenses were rejected. *Id.* at 30.[5]

---

5. Indeed, the Ninth Circuit rejected the "finality" argument of the plaintiff in *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439 (9th

(Cont'd)

Similarly, the Seventh Circuit's cited decision in *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993), lends no support to Petitioner's argument. The issue in *Lever* was whether it was the recommendation of the Dean of the College not to promote plaintiff and grant her tenure or the Provost's decision to accept the Dean's recommendation which triggered the statute of limitations. The Court of Appeals held that the Dean's recommendation was really a decision, as evidenced by his offer to plaintiff of a one year terminal contract. *Id.* at 554. The Seventh Circuit noted that the Dean's decision was self-effectuating, notwithstanding that the recommendation was subject to review by the Provost. As such, the Seventh Circuit's decision did not impose a requirement of finality, since it was the Dean's initial recommendation, rather than the Provost's final decision, which triggered the statute of limitations. *Id.* at 556.

Significantly, unlike many of the cases cited in the Petition where the plaintiff was totally barred from bringing a case, Petitioner here was not prevented from fully litigating his claims. On the contrary, Petitioner challenged the Disciplinary

---

(Cont'd)
Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995), in which the plaintiff, a physician, filed suit alleging, *inter alia*, that the suspension of certain of his operating privileges at the defendant hospital violated his rights under 42 U.S.C. § 1981. The Ninth Circuit affirmed the dismissal of the plaintiff's claim, holding that the statute of limitations was triggered by the summary suspension of the plaintiff's privileges by the Medical Executive Committee of the hospital and not by the subsequent notification formalizing the suspension and denying the plaintiff's request for fair hearing conditions. Thus, there was no requirement of "finality" imposed and the Ninth Circuit's decisions in *McCoy* and *Fobbs* interpreting *Ricks* are consistent with those of the other Circuit Courts of Appeal. Petitioner's assertions to the contrary are simply incorrect.

Committee's final decision, albeit unsuccessfully, in the original district court proceedings and before the Third Circuit. App. A and B to Opposition at 10a and 28a.

The cases cited by Petitioner from the Second and Sixth Circuits are also entirely consistent with this Court's decision in *Ricks*. In *Morse v. University of Vermont*, 973 F.2d 122 (2d Cir. 1992), the Second Circuit noted that in determining the accrual date in a discrimination claim, the timeliness of the claim "is measured from the date the claimant receives notice of the allegedly discriminatory decision." *Id.* at 125 (quoting *O'Malley v. GTE Serv. Corp.*, 758 F.2d 818, 820 (2d Cir. 1985)). In that case, the discriminatory decision was the decision to terminate the plaintiff as a candidate for a Master's degree. Consistent with *Ricks*, the fact that the University undertook an internal review of the matter and allowed the plaintiff to continue to take courses at the University had no effect on the accrual date of her cause of action. There is nothing in that Court's opinion to support Petitioner's argument that the Second Circuit's focus on the date when plaintiff was notified of the adverse decision is at odds with decisions of the Seventh, Ninth, or District of Columbia Circuits. Rather, the Second Circuit was merely giving the plaintiff the benefit of the last possible date when her cause of action accrued, which was the date when she was notified of the discriminatory decision rather than the date of the decision itself.[6] Since the University informed plaintiff of its decision in a letter, the operative date would have been the date of the letter, rather than the date of the decision.

Similarly, the Sixth Circuit's cited decision in *Blackwell, Inc. d/b/a Kuka's Place v. Fisher*, 1993 U.S. App. LEXIS 29295

---

6. Petitioner here challenged the sanctions imposed by the original decision of the Disciplinary Committee, which he then appealed internally, and not the internal appeal process itself.

(6th Cir. 1993), merely stands for the well-settled proposition that a plaintiff's cause of action accrues when he knows or has reason to know of the injury which is the basis of the action. Quoting *Ricks*, the Sixth Circuit noted, as did the district court and Third Circuit here (App. B to Petition at 18a and App. A to Petition at 6a), that the proper focus is upon the time of the allegedly illegal act and not upon the time at which the consequences became painful. *Id.* at *5. Therefore, the Sixth Circuit's decision in *Fisher*, like all the other Circuit Court decisions cited by Petitioner, is entirely consistent with *Ricks*.[7]

III.

PETITIONER'S CLAIM CONCERNING HIS PSYCHIATRIC EXAMINATION IS TIME-BARRED AND IS CONSTITUTIONALLY UNSUPPORTED.

Petitioner's challenge to the imposition of psychiatric counselling is time-barred, as the district court and Third Circuit found, for the reasons set forth above. This sanction was imposed by the Disciplinary Committee on October 17, 1994 and immediately injected into the record of the then district court proceedings by Petitioner for purposes of judicial review. App. A to Opposition at 4a-5a, 10a. The sanction was later

---

7. Finally, the cited case of *Dunleavy v. Local 1617, United Steelworkers of America*, 814 F.2d 1087 (6th Cir. 1987), involved a claim under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, *et seq.* The Sixth Circuit specifically held that this Court's decision in *Ricks* was inapposite because of the unique policy behind the Labor Management Reporting and Disclosure Act in favor of resolving internal labor disputes. *Id.* at 1091. Thus, the Sixth Circuit held that the statute of limitations was tolled while the plaintiff pursued his internal union remedies which he was required by the union constitution to exhaust. Accordingly, the analysis of the Sixth Circuit in *Dunleavy* is simply inapplicable to a civil rights claim and lends no support to Petitioner's argument.

modified by the intermediate Faculty Review Committee by replacing the 100 hours of psychological counseling with a single psychiatric examination. The Plenary Faculty decision of January 18, 1995, left the decision of the Faculty Review Committee with regard to the psychiatric examination intact.[8] In light of the fact that Petitioner's present counsel did not institute suit until January 21, 1997, more than two years after the Disciplinary Committee issued its decision on October 17, 1994, his claim concerning the imposition of a psychiatric examination was also found by the district court and the Third Circuit to be barred by the applicable two-year statute of limitations. App. B to Petition at 18a and App. A to Petition at 6a-7a.[9]

In addition, Petitioner had a full and fair opportunity to raise this issue in his first lawsuit. The district court on remand in the first action conducted an extensive damages hearing on February 23, 1996, at which time Petitioner had ample opportunity to and did present evidence of the alleged stigma and damage to his reputation suffered as a result of the Disciplinary Committee's sanctions, which included the requirement that Petitioner seek psychological counseling. As the district court held:

---

8. This is not a case where the sanctions imposed were increased during the internal appeal process. Here, the sanctions imposed by the Disciplinary Committee of 100 hours of community service and 100 hours of psychological counseling were modified through the internal appeal process to require only a favorable psychiatric evaluation by a psychiatrist of Petitioner's choice prior to his readmission to the Law School.

9. In his Petition for Writ of Certiorari, Petitioner improperly refers to and includes in his Appendix the results of a polygraph examination. Said results were not a part of the record before the district court, nor were they presented to the Law School Disciplinary Committee. *See* Rule 10(a) of the Rules of Appellate Procedure.

> Herbert himself is responsible for any damage caused to his reputation. Herbert presented no evidence showing that Dean Reinstein notified any person about the circumstances of the suspension. Rather, Herbert embarked on a campaign to publicize the suspension and the reasons underlying the suspension.

App. C to Opposition at 44a.

Nevertheless, Petitioner argues that it was unconstitutional for him to undergo a psychiatric examination as a condition of his readmission to the Law School. He relies upon *Addington v. Texas*, 441 U.S. 418 (1979) to support his position. However, *Addington* only dealt with the proper burden of proof for a civil commitment to a state psychiatric hospital. In the present case, Petitioner was never compelled to undergo psychiatric treatment nor was he civilly committed to a state mental hospital. He was only required to undergo a psychiatric examination as a condition of his readmission to the Law School because Petitioner had previously engaged in a number of confrontations in which he demonstrated increasingly violent behavior. This conduct culminated in the incident of May 3, 1994, in which Petitioner sprayed an unarmed individual with dangerous pepper gas inside the Law School building, during final exams. Moreover, Petitioner did obtain a favorable evaluation from a psychiatrist of his own choosing, resulting in his readmission to the Law School in January, 1997, from which he successfully graduated in May, 1997.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Of Counsel:

GEORGE E. MOORE
University Counsel
Temple University
435 Carnell Hall
Broad St. & Montgomery Ave.
Philadelphia, PA 19122
(215) 204-6542

CARL W. HITTINGER
Counsel of Record
DONALD E. WIEAND, JR.
STEVENS & LEE, P.C.
1818 Market Street
14th Floor
Philadelphia, PA 19103
(215) 751-1946

Attorneys for Respondents

APPENDIX

APPENDIX A — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 20, 1994 AND FILED OCTOBER 21, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT

V.

ROBERT REINSTEIN
TEMPLE UNIVERSITY SCHOOL OF LAW
TEMPLE UNIVERSITY

Newcomer, J. October 20 , 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a full and final hearing on plaintiffs' request for permanent injunctive relief held on October 13 and 18, 1994,[1] and after consideration of the testimony of the witnesses, the admitted exhibits, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

---

1. Plaintiffs originally came before this Court with a motion for a preliminary injunction. Upon Order of this Court, the hearing was considered a final hearing, not a hearing for preliminary injunctive relief.

Appendix A

FINDINGS OF FACT

1. Plaintiff Lincoln Herbert has been a student at Temple University School of Law since August 1991. Mr. Herbert was a full-time student during his first two years. Mr. Herbert attended part-time during his third year and planned to continue part-time for a fourth year. Mr. Herbert intended to graduate from the law school in May 1995.

While a student at Temple, Mr. Herbert founded and acted as president of the Western Heritage Society, a politically "right-wing" student organization. The Western Heritage Society's viewpoints were unpopular among many students, faculty and administrators at Temple University and the law school.

2. Mr. Herbert received a letter from the Dean of the Law School, Robert Reinstein, at 11:00 a.m. on May 5, 1994. The letter stated that the Dean had received reports of an act of violence involving Mr. Herbert's use of a weapon, pepper gas, inside the law school. As a result of the incident, one asthmatic Temple University employee suffered injuries requiring brief hospitalization. The letter further stated that the Dean was investigating the incident and was considering suspending Mr. Herbert. Mr. Herbert was given the opportunity to meet with, and did in fact meet with, Dean Reinstein that afternoon to present his side of the story.

3. During the meeting, Mr. Herbert claimed that he had inadvertently sprayed the employee while attempting to ward off an attack by a homeless person brandishing a knife. He claimed that his use of the pepper gas inside the law school was limited to that necessary for self defense.

4. The Dean continued to investigate the matter. Police reports and reports made by witnesses to the incident contradicted Mr. Herbert's account of the incident. These reports stated that the homeless person did not have a knife and that Mr. Herbert was not under attack in the law school. Moreover, additional evidence showed that a law school security guard was in close proximity to Mr. Herbert when Mr. Herbert sprayed the pepper gas.

5. The Dean was aware of several other incidents that had occurred during Mr. Herbert's tenure at the law school. The incidents included an altercation between Mr. Herbert and the owner of a food truck parked daily outside the law school; an episode in which Mr. Herbert allegedly acted aggressively toward the eleven year old daughter of a Temple University student; complaints of extreme hostility and rudeness by Mr. Herbert to various Law School staff and employees, including Assistant Dean Adelaide Ferguson; complaints about Mr. Herbert's behavior made by the supervisor and employees of the Temple University Copy Centers; and an incident of violence involving Mr. Herbert and the police at a Chinese restaurant located near the University.

6. On the afternoon of May 5, 1994, the Dean suspended Mr. Herbert. The stated reason for the suspension was that Mr. Herbert was found to present a clear and present danger to the law school community. At trial, Mr. Herbert alleged that the stated reason was merely a pretext. He alleged that the Dean suspended him because the Dean disagreed with his political philosophy and that of the Western Heritage Society.

7. Mr. Herbert was suspended from classes and was not permitted to be physically present on the Temple University

campus until after his case had been resolved through the school's student disciplinary system. Although Mr. Herbert was suspended on May 5, 1994, he was permitted to complete the semester by taking his final examinations at home. Mr. Herbert passed his final examinations. As such, Mr. Herbert's suspension from academic classes did not actually begin until the fall semester, 1994.

8. The Dean referred the case to the Law School's disciplinary counsel. Mr. Herbert was charged with violating the law school code of student conduct by: (1) engaging in acts of violence; and (2) telling falsehoods to a University administrator. As required by the code of conduct, the disciplinary counsel scheduled a hearing before a student committee. The hearing was scheduled for June 21, 1994.

9. Mr. Herbert, through his counsel, requested and was granted three continuances of the hearing. The hearing was finally held on October 3, 1994. The delay in holding the hearing was primarily due to Mr. Herbert's requests for continuance.

10. At the hearing, Mr. Herbert was represented by two attorneys who had the opportunity to object to the introduction of evidence and/or to the hearing officer's instructions to the hearing panel. After reviewing all the evidence, the panel found Mr. Herbert not guilty of engaging in acts of violence and guilty of telling falsehoods to the Dean.

11. Mr. Herbert claims that the October 3, 1994 hearing violated his due process rights because the instructions given to the student panel before their deliberations were unclear.

12. The disciplinary hearing committee met on two more occasions in order to impose sanctions on Mr. Herbert. On

Appendix A

October 17, 1994, the disciplinary committee voted to suspend Mr. Herbert from the law school until January 1997, at which time he could return as a student on a probationary basis. The committee also voted to require that Mr. Herbert undergo one hundred hours of psychological therapy and perform one hundred hours of community service.

CONCLUSIONS OF LAW

1. Courts must show great respect to decisions by University faculty regarding their professional judgments. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

2. A claim of deprivation of Fourteenth Amendment procedural due process rights leads to a two-step inquiry: 1) whether there has been a deprivation of "life, liberty or property" through state action; and 2) if there has been such a deprivation, whether the plaintiff received all the process which he is due under the Fourteenth Amendment. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1975).[2]

3. Once a state undertakes to provide educational services, students attending the school acquire a constitutionally

---

2. This Court will address only the due process issues. Although Mr. Herbert alleged at trial that defendants' actions also violated his First Amendment rights of free speech and free association, he failed to sufficiently plead these claims in his Complaint. Consequently, this Court considered Mr. Herbert's evidence regarding selective enforcement of various University rules with regard to the Western Heritage Society, but only for the limited purpose of establishing bias by defendants as the reason for Mr. Herbert's suspension. After reviewing all the evidence, this Court concludes that Mr. Herbert failed to establish that bias by defendants was the real reason for his suspension.

protected property interest in obtaining an education. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). In this case, Temple University School of Law is a state-supported institution. Consequently, Mr. Herbert has a constitutionally protected property interest in continuing his legal education there.

4. Given that Mr. Herbert has a constitutionally protected property interest, the next question is what process was due when he was deprived of that right. The standard differs, depending on whether the suspension was for more or less than ten days. *Goss*, 419 U.S. at 581.

In this case, it is unclear how the Court should characterize the duration of the suspension. Mr. Herbert was suspended from classes and banned from the Temple University campus on May 5, 1994. However, classes had already ended for the semester and Mr. Herbert was not registered for summer classes. Moreover, he was permitted to take his remaining final examinations at home. The hearing was scheduled for June 1994, during the summer term, but was continued until the fall-semester at *Mr. Herbert's* request.

On the other hand, Mr. Herbert was banned from the Temple University campus until his hearing. Therefore, while Mr. Herbert was not deprived of the right to attend classes, he was precluded from engaging in extracurricular activities and from using the school's career planning office during the summer.

In either case, the characterization of Mr. Herbert's suspension is not dispositive; thus, this Court need not address the question of whether Mr. Herbert's suspension exceeded ten days. As the following conclusions demonstrate, this Court finds

that Mr. Herbert received all process that he was due under either standard.

5. For suspensions of ten days or less, a student must be provided with oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have, and an opportunity to provide his side of the story. *Goss v. Lopez*, 419 U.S. 565, 581. *See also Jarmon v. Batory*, 1994 WL 313063 (E.D. Pa.) (Hutton, J.). Such an informal hearing

> will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel.

Goss, 419 U.S. at 583-84.

In this case, Mr. Herbert's informal hearing met the requirements of *Goss*. Mr. Herbert was informed that he was accused of violent acts and of presenting a danger to the Temple University community. Mr. Herbert was also told of the reports made by police and witnesses to the incident. Finally, Mr. Herbert was given the opportunity to tell his side of the story. Dean Reinstein then decided to refer the case to the disciplinary counsel. Since Mr. Herbert's story differed from that of several witnesses, the ultimate determination was a credibility evaluation. The Dean was entitled to make that evaluation. It is not the role of the federal courts to set aside decisions of

school administrators, even if the court may view them as lacking a basis in wisdom or compassion. *Zeller v. Donegal School Dist. Bd. of Ed.*, 517 F.2d 600, 606 (3d Cir. 1975) (en banc).

6. Any suspension for a period of longer than ten days is deemed an expulsion and "may require more formal procedures" than the notice and hearing requirement articulated in *Goss*. *Goss*, 419 U.S. at 584; *Jarmon*, 1994 WL 313063 at *6. In the case of a suspension for more than ten days, this Court must determine whether a violation of due process has occurred. In making this determination, the Court must balance the private interest affected by the official action; the risk of an erroneous deprivation of that interest; and the public interest weighed against the fiscal and administrative burden of any additional procedural requirements. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1979), quoted in *Jarmon*, 1994 WL 313063 at *6.

In this case, Mr. Herbert's interest in obtaining an education is clearly significant. However, any harm suffered by Mr. Herbert in the case at bar was to some extent mitigated by the fact that Mr. Herbert was permitted to take his final exams at home. *See, e.g. Jarmon*, 1994 WL 313063 at *9 (potential harm was mitigated by school's provision of homework assignments to student excluded from school). In fact, Mr. Herbert received the highest grade point average of his law school career during the spring 1994 semester.

Moreover, but for the continuances granted at Mr. Herbert's request, the hearing would have taken place before the commencement of the fall semester. That way, if Mr. Herbert had been exonerated at the hearing, he would not have missed any academic classes.

Finally, this Court must balance against Mr. Herbert's interest the substantial interest of Temple University and the Law School in preserving a safe environment for students and employees. Upon such a balancing, this Court finds that Mr. Herbert received the process due to him.

7. In certain situations, a prior notice and hearing cannot be insisted upon. Students who pose a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. *Jarmon*, at *9, quoting *Goss*, 419 U.S. at 582.

This Court finds that the Dean's conclusion that Mr. Herbert was a clear and present danger was not unreasonable and was supported by evidence, including interviews with the police, university officials, and witnesses to the pepper gas incident. Other evidence included the audiotape of a telephone call made by Mr. Herbert to the security guard on duty that night. Moreover, the police reports of the incident reviewed by the Dean also support his conclusion. Finally, by May 1994, the Dean was aware of various other incidents highlighting Mr. Herbert's propensity for aggression that had occurred at or near the Law School during the 1993-1994 academic year. Consequently, this Court will not second-guess the Dean's determination that Mr. Herbert posed a clear and present danger to the Temple University community.

8. Since Dean Reinstein's determination that Mr. Herbert presented a clear and present danger is supported by evidence in the record, this Court finds that the Dean did not suspend Mr. Herbert because the Dean disapproved of Mr. Herbert's political beliefs. This Court thus rejects Mr. Herbert's argument that the Dean's "clear and present danger" argument was a mere pretext.

Appendix A

8. This Court finds that Mr. Herbert received all process that he was due at the formal hearing before the student panel.

First, Mr. Herbert was represented by two attorneys, both of whom actively participated in the hearing. Mr. Herbert's attorneys had the opportunity to object to the hearing officer's instructions to the hearing panel and did not do so. Moreover, Mr. Herbert's counsel did not request that any form of special interrogatories be given to the panel to complete during deliberations. Mr. Herbert's counsel merely requested, at a *later* sanctions hearing, that the jury be polled. Consequently, this Court will not now disturb the hearing panel's decision based on Mr. Herbert's belated argument that the instructions were unclear.

Second, this Court rejects Mr. Herbert's argument that he was deprived of due process because the formal hearing was closed to the public. The code of conduct provides that a student accused of violating the code is entitled to an open hearing if the student files a written motion at least five days before the hearing. In this case, Mr. Herbert failed to abide by these rules. When he raised the issue at his hearing on October 3, 1994, it was too late for the hearing officer logistically to plan for an open hearing.

Finally, this Court notes for the record that, contrary to Mr. Herbert's argument that the hearing was a quasi-criminal proceeding, there is no requirement that the technicalities of criminal procedure be applied in school suspension cases. *Brewer v. Austin Indep. School Dist.*, 779 F.2d 260, 263 (5th Cir. 1985). *See also Nash v. Auburn University*, 812 F.2d 655, 664 (11th Cir. 1987) (*citations omitted*). Rather, the appropriate standard is that cited in *Goss*.

Appendix A

An appropriate Order follows.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Appendix A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT,

Plaintiff,

v.

TEMPLE UNIVERSITY
TEMPLE UNIVERSITY SCHOOL OF LAW
ROBERT REINSTEIN, DEAN

Defendants.

ORDER

AND NOW, this 20th day of October, 1994, upon consideration of Plaintiffs' Motion for Preliminary Injunction, considered by the Court as a motion for final injunctive relief, and Defendants' response thereto, and consistent with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the motion is DENIED. Judgment is entered in favor of Defendants and against Plaintiff.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 6, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2138

LINCOLN HERBERT,

Appellant

v.

ROBERT J. REINSTEIN, DEAN OF
TEMPLE UNIVERSITY SCHOOL OF LAW &
VICE-PRESIDENT OF TEMPLE UNIVERSITY;
TEMPLE UNIVERSITY SCHOOL OF LAW;
TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 94-05765)
District Judge: Honorable Clarence C. Newcomer

Submitted under Third Circuit LAR 34.1(a)
May 18, 1995

BEFORE: STAPLETON, GREENBERG and ALITO,
Circuit Judges

OPINION OF THE COURT

OCT 06 1995

Appendix B

GREENBERG, *Circuit Judge*.

This civil rights action is before this court on appeal by Lincoln Herbert, appearing *pro se*, from a final order entered on October 21, 1994, denying him injunctive relief and entering judgment for the appellees, Robert J. Reinstein, Dean of the Temple University Law School, and the school and the university. We determine that the appellees did not provide Herbert with procedural due process at his pre-suspension hearing pending a formal disciplinary hearing, and thus we will reverse the order in part and will remand the matter for further proceedings. We conclude, however, that at the subsequent formal hearing before the Law School Disciplinary Committee the appellees afforded Herbert with procedural due process. Inasmuch as Herbert currently is suspended as a result of this hearing, we will deny him injunctive relief.

I. FACTUAL BACKGROUND

Herbert attended Temple University Law School, starting in 1991. He is the founder of the Western Heritage Society, which the district court characterized as "a politically 'right-wing' student organization" whose "viewpoints were unpopular among many students, faculty, and administrators at Temple University and the law school." Findings of Fact and Conclusions of Law at 2. This organization sponsored lectures at the law school, published a newsletter, and placed posters in the law school building. On April 18, 1994, Dean Reinstein issued a written message that was addressed to the "Law School Community" and that denounced the organization.[1] During his

---

1. The Dean's written message reads as follows:

To the Law School Community:

A small number of students who identify themselves as the Western Heritage Society have repeatedly posted

(Cont'd)

attendance, Herbert was involved in several incidents that could be viewed as demonstrating that he has an aggressive nature. He quarreled with the owner of a food truck parked regularly outside the law school. He took an eleven-year-old girl to the Dean's office after observing her removing a Western Heritage Society poster, whereupon the child burst into tears. The child's mother notified the school that Herbert later approached her daughter again; she asked that he be kept away from the child. Several employees of the school also complained about Herbert's hostile behavior towards them.

(Cont'd)

> messages of vitriol and hatred in the building. Their apparent purpose is to verbally assault individuals and groups within our community.
>
> The Law School does not have a speech code that prohibits hateful expression. I firmly believe that such prohibitions would be wrong and counter-productive. An academic community must allow the widest latitude for free speech — even speech that tests the outer limits of tolerance. The expression of ideas that we despise cannot be suppressed without endangering those we embrace.
>
> However, legal protection should not be confused with moral approval. The members of the Western Heritage Society should not be left in doubt that the practice of expressing hate speech is reprehensible; that it disqualifies them from being considered serious participants in legitimate political debate; and that their efforts to degrade others serve to discredit and diminish themselves.
>
> /s/
> Robert J. Reinstein
> Dean

Appendix B

Herbert was also involved in an incident at an off-campus restaurant. The police report indicated that Herbert had seen a man wielding a knife in the restaurant. After the police were called the man left, but Herbert followed him outside and sprayed pepper gas at him. Upon their arrival, the police saw the man holding the knife at his side and told him to drop it. While they attempted to disarm the man, Herbert again sprayed pepper gas at the man.

On the evening of May 3, 1994, a man, later identified as Mark Thompson, approached Herbert outside the law school and asked him for money. Herbert claimed that when he refused, Thompson told him that he had a knife and appeared to reach for it. Herbert then sprayed pepper gas in Thompson's face and went through the two sets of doors that led into the law school lobby. Herbert then informed the security guard that Thompson had threatened him with a knife. After the guard called the campus police, Herbert repeated his account to them over the telephone. Next, Thompson came through the first set of doors, shouting at Herbert. When Thompson began to come through the second, inner set of doors, Herbert sprayed him again with the pepper spray. Thompson retreated. Later, the police searched Thompson and the surrounding area without finding a knife. Residual spray in the air caused considerable irritation to one of the school employees who later passed through the area.

On the following day, Assistant Dean Adelaide Ferguson investigated the incident and interviewed people who witnessed the events in the lobby. She reported her findings to Dean Reinstein, who also reviewed campus police reports and met with the campus police. On May 5, 1994, Dean Reinstein wrote the following to Herbert:

Appendix B

> I have received several reports from witnesses to an incident that occurred in the Law School lobby on the evening of Tuesday, May 3 which provide reason to conclude that YOU committed an act of violence which harmed several of our employees and a stranger in violation of Temple Law School's Code of Student Conduct. The reports also give me reason to believe that your continued presence in the Law School may pose a clear and present danger to members of the Law School community.

The letter also indicated that Dean Reinstein was considering suspending Herbert and it invited Herbert to meet with him that day to present his account of the incident.

During this meeting on May 5, Herbert explained to Dean Reinstein that Thompson had said that he had a knife, made a threatening movement towards his pocket, and rushed at Herbert. Herbert then sprayed him the first time, outside the building. He also stated that when Thompson started to come into the lobby, he sprayed him again. Herbert also brought up the incident at the restaurant during this meeting. He claimed, however, that the man at the restaurant was lunging at him when the police arrived. Dean Reinstein considered this explanation dubious as it was not supported by the police report that he had read previously.

After this initial meeting, Dean Reinstein continued to investigate the matter. He met again with the campus police, who opined that Herbert's actions were unjustified because they did not find a knife in the vicinity. That afternoon, Dean Reinstein met with Herbert for a second time and suspended him "pending a full investigation by the Disciplinary Counsel."

Appellees Br. at 16. The Dean testified that he thought that Herbert "presented a real threat to the people who worked and studied there."

Thus, beginning on May 5, 1994, the appellees did not permit Herbert to be physically present on the Temple campus. As that date was during the examination period, the appellees allowed Herbert to take his final examinations at home. He therefore was able to complete the spring semester and did so.

Dean Reinstein then referred Herbert's case to the school's disciplinary counsel. Due to his examination schedule, however, Herbert requested that the disciplinary counsel delay its investigation until the end of the examination period. Accordingly, the investigation began on May 23, 1994. In a letter to Herbert dated June 14, 1994, the disciplinary counsel formally charged Herbert with violating two sections of the law school disciplinary code by "committing an act of physical violence or intimidation against members of the law school community," and by "communicat[ing] serious falsehoods to a member of the Faculty or Administration concerning official business of the law school." A hearing was set before the Law School Disciplinary Committee on June 29, 1994.

Nevertheless, to honor one request from the disciplinary counsel and three requests from Herbert for delays, the hearing was not held until October 3, 1994. Herbert was represented by counsel at that hearing. A panel of students and faculty members found that Herbert did not engage in violence against a member of the law school community because Thompson was not associated with the school but that Herbert did communicate serious falsehoods to Dean Reinstein concerning official business of the school. The panel decided to suspend Herbert

from attending the law school until June 1997. It also required him to undergo 100 hours of psychological counselling and perform 100 hours of community service before being readmitted.

II. PROCEDURAL BACKGROUND

On September 21, 1994, while the disciplinary proceeding was pending within the school, Herbert filed a pro se complaint in the district court against Dean Reinstein, the law school, and Temple University. The complaint alleged that, in suspending him, the appellees denied him due process of law and infringed his free speech and free association rights in violation of 42 U.S.C. § 1983. Herbert requested declaratory and injunctive relief, compensatory damages of $6,000,000, and punitive damages. At the same time, Herbert also filed a motion for a temporary restraining order seeking immediate readmission to the law school.

After a conference with the parties, the district court entered an order, dated September 21, 1994, denying the motion for a temporary restraining order and directing the parties to appear on September 30, 1994, "for a full and final hearing on the merits of this case," thus consolidating the request for a preliminary injunction with the trial on the merits. Due to postponement by the court, the hearing was held on October 13 and 18, 1994. On October 20, 1994, the district court rendered its findings of facts and conclusions of law. The court found that the appellees met the due process requirements set forth in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), for suspensions of up to ten days, as well as those set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976), for suspensions of more than ten days. It also stated that it would

consider only Herbert's due process claims because it found that although he "alleged at trial that defendants' actions also violated his First Amendment rights of free speech and free association, he failed to sufficiently plead these claims in his Complaint." *Herbert v. Reinstein*, No. 94-5765, Findings of Fact and Conclusions of Law at 6 n.2 (E.D. Pa. Oct. 20, 1994). The court's order stated that it considered Herbert's motion for preliminary injunction "as a motion for final injunctive relief" and that said motion was denied.

III. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over this civil rights action pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's denial of a motion for injunctive relief under an abuse of discretion standard. *International Union v. Mack Trucks, Inc.*, 820 F.2d 91, 94 (3d Cir. 1987). "An abuse of discretion exists where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Id.* at 95 (citation omitted).

IV. DISCUSSION

A. Procedural Due Process

The parties agree that Herbert has a constitutionally protected property interest in continued education at this state-supported law school. *Goss v. Lopez*, 419 U.S. at 576, 95 S.Ct. at 737. The school therefore may not suspend him without due process of law. *Id.* Under *Goss*, a suspension of ten days or less

requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581, 95 S.Ct. at 740. "[I]n being given an opportunity to explain his version of the facts . . . , the student [must] first be told what he is accused of doing and what the basis of the accusation is." *Id.* at 582, 95 S.Ct. at 740. Where the student's presence "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," he may be removed immediately and be given the notice and hearing as soon as practicable thereafter. *Id.* at 582-83, 95 S.Ct. at 740.

For longer suspensions and expulsions or more severe penalties, the *Goss* Court indicated that more formal procedures might be required. In those cases, a court should consider the factors itemized in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976), to determine whether enhanced process is required. Those factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903.

The record, as well as the appellees' brief, indicates that Herbert was not given notice of all the reasons on which his

suspension was based. Prior to suspending Herbert. Dean Reinstein expressed to Herbert only his disapproval of the incident involving Thompson. And although they discussed the incident at the restaurant during the first pre-suspension meeting on May 5, it appears that Dean Reinstein did not express then his disapproval of that incident or of Herbert's view of that incident.

The district court found that the Dean "was aware" of the other troublesome incidents and complaints involving Herbert, but it does not appear that Dean Reinstein gave Herbert pre-suspension notice that these other incidents and complaints could be the basis for a suspension. Nevertheless, appellees' brief indicates that the suspension was based in part on these earlier problems. *See* Br. at 13. We think that this point is important, as we cannot conclude that the dean would have suspended Herbert and called him a "clear and present danger" solely because he disbelieved Herbert's accounts of the incidents with Thompson and at the restaurant. After all, Herbert only said that Thompson claimed to have a knife, not that Thompson did have a knife. Accordingly, the fact that the police did not find a knife hardly discredits Herbert's statement.

"The right to a hearing is certainly of little value without prior notice of the charges presented, in sufficient detail fairly to enable the party charged to demonstrate any error that might exist." *Cohen v. City of Philadelphia*, 736 F.2d 81, 84 (3d Cir.) (citing *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.2d 865 (1950)), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434 (1984); *see also Johnson v. Orr*, 776 F.2d 75, 79 (3d Cir. 1985). Thus, in *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74,

80 (3d Cir. 1989), we held that the plaintiffs, who were police officers, were denied due process where they were informed generally of a complaint regarding drug use by police officers but were not told about the specific allegations under investigation or the evidence regarding such allegations. We held that without sufficient specificity of the allegations, the plaintiffs and their attorneys really had no opportunity to explain or rebut the charges. *Id.*; *see also Linton v. Frederick County Bd. of County Comm'rs*, 964 F.2d 1436, 1440-41 (4th Cir. 1992) (general charges of "other incidents" "provide inadequate information to focus [employee] on the operative conduct relied on to fire him").

Similarly, courts have required schools to disclose all relevant charges or allegations on which they base their disciplinary actions so that if those charges are rebutted sufficiently, the student would be exonerated fully. For example, in *Strickland v. Inlow*, 519 F.2d 744, 746-47 (8th Cir. 1975), two students were suspended for "spiking" the punch at a home economics function. The school board, however, based its initial decision to suspend them in part on another charge, undisclosed to the students, that one of them had been involved in a fight at a basketball game. The Court of Appeals for the Eighth Circuit held that the students were denied procedural due process: "[i]gnorant of the scope of the matter under consideration, the plaintiffs' opportunity to present their side of the case was rendered meaningless. . . . They could not refute the factual basis of the Board's decision by showing their innocence of the additional wrongdoing." *Id.* at 747.

Similarly, in *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 927-28 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit held that a student was denied procedural due

process when the superintendent disclosed to the school board but not to the student certain evidence regarding his possession of marijuana. "Such a tactic completely deprived [the student] of any opportunity to rebut the evidence and amounted to a clear deprivation of his right to procedural due process of law." *Id.* 928.

In this case, the law school failed to provide Herbert with the process outlined in *Goss*. Prior to suspending Herbert on May 5, 1994, Dean Reinstein did not indicate to him that the suspension was based partially on incidents other than the one involving Thompson. Even if Herbert was able to convince the Dean that he was not to blame for what happened in the law school lobby on May 3, he had no notice that he also had to justify himself with respect to the other events and complaints in order to avoid suspension.[2]

The *Goss* Court recognized, however, that there may be situations in which prior notice and hearing may be impracticable:

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of

---

2. The district court also noted the issue of whether the Dean's initial suspension of Herbert constituted a suspension of more than ten days. Dean Reinstein initially suspended Herbert on May 5, 1994, during the examination period at the end of the semester. Since Herbert was allowed to take his exams at home, he did not miss any class time that semester. He was denied, however, access to other facilities at the school. Due largely to Herbert's requests, the disciplinary investigation and the hearing were postponed such that this initial suspension lasted until October 1994. Because Herbert had insufficient notice of the reasons on which his suspension was based, we need not decide whether the *Goss* standard or the *Mathews* standard applies.

> disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . .

Goss, 419 U.S. at 582-83, 95 S.Ct. at 740. In his letter to Herbert dated May 5, 1994, Dean Reinstein stated that he believed Herbert's presence in the law school to have posed a "clear and present danger." The district court found that this conclusion was reasonable, given the dean's familiarity with the reports on the incident involving Mark Thompson as well as the prior events and complaints. Thus, the court concluded that the subsequent hearing on adequate notice before the Disciplinary Committee provided due process.

We cannot, however, accept that conclusion with respect to the suspension prior to that imposed by the Disciplinary Committee. First, the *Goss* Court, in carving out the exception from the general rule requiring prior notice and hearing, did not rest its reasoning only on the fact that the student may pose a danger or threaten to disrupt the academic process. The Court also indicated that these situations were limited to those in which prior notice and hearing cannot be given as a practical matter. This may be seen from the Court's explanation of the rule and the exception. The Court first stated that the requirement for prior notice and hearing is fairly rudimentary. Thus, notice may be given at the time of the hearing. *Goss*, 419 U.S. at 582, 95 S.Ct. at 740. "In the great majority of cases," the informal hearing may take place almost immediately following the misconduct. *Id.* It is only in those situations "in which prior notice and hearing cannot be insisted upon" that they may be postponed until after the removal of the student. *Id.* Accordingly, before the exception to the rule requiring prior

notice and hearing may be applied, a court must find that such due process safeguards could not, as a practical matter, reasonably be required because of the intolerable nature of the student.

Here, although Herbert may have posed a physical danger to the law school community, he was not suspended immediately after any alleged misconduct. Even if it were reasonable to say that the May 3 incident involving Thompson showed that Herbert posed a "clear and present danger," Herbert was not removed from the school at that time. Nor did the appellees bar him from the school on May 4. Dean Reinstein did not suspend him until May 5, after he carefully investigated this incident, and then only after meeting with him twice. Moreover, far from not being able, as a practicable matter, to give Herbert notice and a hearing prior to suspending him, the dean attempted to provide Herbert with both. Dean Reinstein wrote the letter to Herbert indicating that Herbert may be suspended for posing a "clear and present danger," discussed the May 3 incident with Herbert, and listened to Herbert's explanation of it. The problem, therefore, was not that Dean Reinstein could not give Herbert prior notice and hearing. Rather, it was that Dean Reinstein, although clearly attempting to respect Herbert's due process rights, nevertheless gave him an inadequate notice and hearing. As the district court found and the appellees admit, Dean Reinstein was aware of the prior incidents and complaints and drew from them his conclusion that Herbert was a "clear and present danger." Yet, Dean Reinstein did not give Herbert even an informal charge of these past problems.

Second, the *Goss* Court required that in the event that a student is removed from school before notice and a hearing

can be given, "the necessary notice and rudimentary hearing should follow as soon as practicable." *Goss*, 419 U.S. at 582-83, 95 S.Ct. at 740. If Dean Reinstein had deemed it imperative to suspend Herbert immediately, without providing these informal due process requirements, the appellees' argument still would fail because they never provided such due process afterwards. On May 5, 1994, Dean Reinstein suspended Herbert pending a full investigation by the school's disciplinary counsel. The disciplinary counsel's investigation led to the formal charge on June 14, 1994 that Herbert violated the school's code of conduct, and eventually to the hearing before the school disciplinary panel.[3] Neither the formal charges nor the panel hearing, however, explained to Herbert all the reasons why Dean Reinstein suspended him initially, pending the full investigation by the disciplinary counsel.

Moreover, the formal charges and panel hearing were not what *Goss* requires, which is simply that the student "be told what he is accused of doing and what the basis of the accusation is" and "be given an opportunity to explain his version of the facts." *Id.* at 582, 95 S.Ct. at 740. If the school could not, as a practical matter, give Herbert such preliminary process prior to suspending him on May 5, 1994, it should have provided it soon after. The school need not have waited for its formal disciplinary process before notifying him of *all* the reasons on which his suspension was based and giving him an opportunity to explain or refute them. Furthermore, it is unclear that Herbert ever received notice of these other grounds for his initial suspension prior to the initiation of this civil suit.

---

3. Due to their accommodation of Herbert's various requests, the school did not charge Herbert formally with violations of the school's code of conduct until June 14, 1994. And due in part to Herbert's requests, his hearing before the school disciplinary panel did not occur until October, 1994.

Since we find that appellees violated Herbert's right to procedural due process in their actions to suspend him, we will remand the case to the district court for declaratory relief and determination of damages.[4] In doing so, the district court, even if it determines that the initial suspension substantively was justified, should take into account *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054 (1978), which states that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." However, we conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he is not entitled to injunctive relief. Furthermore, the court should, in considering damages, take into account that Herbert ultimately was suspended in procedurally proper proceedings.

B. Consolidation of the Case

We discuss briefly the scope of the case on remand in response to two of Herbert's procedural arguments. Herbert contends that the district court erred in consolidating his request for a preliminary injunction with a trial of the action on the merits under Federal Rule of Civil Procedure 65(a)(2), alleging that the court gave him insufficient notice of its intent. The docket, however, reflects that the court held a conference with the parties, after which it entered an order dated September 21, 1994, denying Herbert's motion for a temporary restraining order and requiring explicitly that the parties appear on September 30, 1994 (later changed to October 13) "for a full and final hearing on the merits of this case."

---

4. Although the district court disposed of his case by only denying the injunctive relief, Herbert also requested declaratory relief, compensatory damages, and punitive damages.

Appendix B

Although Herbert was appearing pro se at the start of his case and during the conference, he retained counsel prior to the hearing and counsel represented him at the hearing. His attorney should have realized from the order that the court was hearing the case on a consolidated basis. At the start of the hearing, however, Herbert's attorney appeared to have been taken by surprise when the court announced that the case was being heard on a consolidated basis. At this response, the district court noted that the parties had agreed to the consolidation at conference, and Herbert's counsel did not object. Nor did he voice any objection over this issue during the two-day-long trial. Furthermore, it appears that Herbert was able to present his entire case on liability. Accordingly, it would be prejudicial to appellees, who proceeded in good faith to defend themselves according to the court-ordered schedule, if the case were allowed to be reopened on the basis that the preliminary and final aspects of the case should not have been consolidated. Therefore, we will not require that by reason of the consolidation that the district court hold another trial on liability.

Herbert's second procedural contention is that the procedure followed deprived him of a right to a jury trial. We, however, reject this contention because he never sought a jury trial by demanding one under Fed. R. Civ. P. 38(b). While he suggests that he had no opportunity to seek a jury trial, his failure even to attempt to do so forecloses that argument here.

Finally, we note that Herbert explicitly has chosen not to appeal certain issues, relying on this court to require another trial on the merits. In particular, the district court dismissed Herbert's allegations of First Amendment violations, concluding that although Herbert made such allegations at trial, "he failed to sufficiently plead these claims in his Complaint." Findings of Fact and Conclusions of Law at 6 n.1. But Herbert

chose explicitly not to appeal this issue.[5] Br. at 3; Reply Br. at iv. Herbert's reliance on obtaining another trial is misplaced. Even if we were to require another trial on the merits, the district court still would be faced with what it believed to be a complaint that inadequately pled First Amendment violations. Since Herbert waived explicitly this issue on appeal and neither party has briefed this issue, however, we decline to review it.

V. CONCLUSION

For the above reasons, we will reverse the order of October 21, 1994, insofar as it entered judgment for the appellees, but we will affirm it insofar as it denied injunctive relief. We will remand the case to the district court for determination of damages and entry of declaratory relief in favor of Herbert. The parties will bear their own costs on this appeal.

TO THE CLERK:

Please file the foregoing opinion.

s/ [illegible]
Circuit Judge

DATED:

---

5. Herbert does argue on appeal that his speech activities caused Dean Reinstein to be biased against him and therefore the Dean could not have given him a constitutionally sufficient pre-suspension hearing. Since we found that Herbert was not given adequate notice, we need not reach this issue. We note, however, that Herbert is not entitled to be heard before an impartial decision-maker at every step of his suspension process. The school and the state would have satisfied constitutional requirements if they offered a post-suspension hearing before an impartial adjudicator who would be able to correct any pre-suspension bias. *McDaniels v. Flick*, 59 F.3d 446, 459-61 3d Cir. 1995) (employee not entitled to impartial adjudicator prior to termination if post-termination process would allow for correction).

Appendix B

HERBERT v. REINSTEIN, No. 94-2138

s/ [illegible]
STAPLETON, *Circuit J.*, dissenting:

I respectfully dissent.

The procedural component of due process of law requires only that there be a reasonable accommodation between the individual's interest in a reliable determination of the relevant facts and law and any competing interests of the state. This is the teaching of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Goss* case reflects an application of this basic principle in the context of suspensions of public high school students. *Goss v. Lopez*, 419 U.S. 565 (1975). For present purposes, the most important thing about *Goss* is its recognition that the state has a compelling interest in the security of its citizens and property, to which an individual's interest in pre-deprivation process must yield.[1]

Based on these principles, I would hold that Herbert, prior to his exclusion from the campus, was at most entitled to (1) oral notice of the fact that the University, as a result of the

---

1. The Court held, in part:

> We agree . . . that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . .

419 U.S. at 582-83.

May 3rd incident, was considering his exclusion in order to protect the members and property of the school community, and (2) an immediate opportunity to state why his exclusion was not necessary. I would affirm the judgment of the district court because Herbert received such notice in writing and was afforded such an opportunity. Moreover, if due process would otherwise have required the University to provide Herbert with pre-exclusion notice of all information known to the Dean on May 5th that might be relevant to the exclusion issue, the emergency exception recognized in *Goss* would have authorized Herbert's immediate exclusion with no pre-exclusion process.

Assistant Dean Adelaide Ferguson received notice of the library incident on the morning of May 4th and immediately instituted an investigation. She informed the Dean of the information she learned, and he continued the investigation on May 5th. During the morning of that day, his investigation included an interview with Herbert concerning the library incident, conducted after written notice to him that his exclusion was being considered as a result of that incident. By afternoon, the information available to the Dean led him to the reasonable conclusion that Herbert's presence on campus presented an unacceptable risk to the school community. He personally advised Herbert of his conclusion and referred the matter to the disciplinary counsel for a full investigation and prompt, appropriate process.

The investigation by the disciplinary counsel was delayed at Herbert's request, and he was not formally charged with disciplinary violations until a little over a month after the suspension. Given Herbert's request for a delay in the investigation and the fact that he was permitted to complete and receive credit for the semester, I do not view the filing of

formal charges as less than prompt. Similarly, while the hearing on the formal charges did not occur until October, this was largely attributable to Herbert's requests for continuances and the delay, accordingly, was not unreasonable.

Unlike the majority, I find it hard to fault the Dean's handling of this matter. This was the kind of situation in which it was in everyone's interest to investigate before any action was taken. At the same time, there were indications that the school community might be at risk. As a result, the Dean and his assistant conducted an expedited, preliminary investigation of the library incident over a period of a day and a half. If their expedited, preliminary investigation had not convinced the Dean in the early afternoon of May 5th that Herbert posed an unacceptable risk to the school community, the investigation would have continued, charges would have been filed in accordance with the University's disciplinary rules, a hearing would have been held under those rules, and Herbert only then would have been suspended. As it happened however, the Dean, after notifying Herbert that his exclusion was being considered and after listening to Herbert's side of the story, came to reasonably believe that there was an immediate threat and he acted appropriately in response.

As I understand the court's opinion, it faults the Dean on two grounds. First, it concludes that there could be no exclusion consistent with due process until the Dean gave Herbert notice of all information in his possession relevant to the exclusion issue and held a hearing at which Herbert would have the opportunity to rebut all of that data or put it in the best perspective possible. I am unable to accept this conclusion.

The scope of the notice required by the court does not, in my judgment, strike a realistic balance between the needs of

one in Herbert's position and the needs of the institution. Herbert was told that the library incident had prompted an investigation and had raised concern about whether the school community needed protection from aggressive behavior on his part. He was also given the opportunity to give his own account of the events of the night of May 3rd and to urge that his exclusion was not necessary to the security of the school community. While he might have preferred to receive advance notice of all potentially relevant information known to the University, the absence of such notice did not preclude him from addressing the exclusion issue in a meaningful way and a requirement of such notice would have been an unreasonable burden to the University in its effort to determine whether it needed to take steps to protect itself. It is simply not possible for an institution in the University's position to know prior to completing its preliminary investigation just what information will be relevant and important to the decision or exclusion. That will necessarily depend on what surfaces during the investigation, including what is disclosed during its interview with the student alleged to present a threat.

I do not understand the court to suggest that the Dean was prohibited from interviewing Herbert as a part of his expedited, preliminary investigation. Herbert was an important source of information about the May 3rd incident and the Dean would have been remiss if he had failed to interview Herbert. Apparently, the court contemplates that once the Dean completed his preliminary investigation, he should have notified Herbert of the information then known to the Dean, including the information concerning the half dozen or so prior incidents in which someone reported observing aggressive behavior on the part of Herbert. This would then be followed by a hearing during which Herbert would be able to respond to everything known to the Dean.

Appendix B

While it is true that it might have been possible for the Dean at the conclusion of his preliminary investigation to provide to Herbert a catalog of the available information, I do not believe such a catalog would have had any even marginal effect on the reliability of the process afforded unless it had been provided in writing and unless some reasonable opportunity had been provided prior to the hearing to permit preparation of Herbert's rebuttal. This, however, would have required the University to assume a risk that due process does not require it to assume.

The court reads *Goss* as imposing two requirements for a constitutionally valid emergency suspension without pre-deprivation process: (1) a reasonable perception on the part of the decisionmaker of an unreasonable risk to persons or property, and (2) an "impracticability" of affording notice of, and a hearing concerning, all of the information giving rise to the perception. Given the court's disposition of this case, it is not clear to me what the court would regard as a situation in which it is "impractical" to afford notice and a hearing. If the purposes of procedural due process protection and the emergency exception are to be served, however, the issue posed by the second requirement has to be whether a meaningful notice and hearing can be afforded *without subjecting persons and property to the risk that has reasonably been found unacceptable.* The sensible teaching of *Goss* is that once an official responsible for the security of a public institution concludes that that security is threatened, he or she does not have to tolerate the continuation of that risk.

Where the subject of an investigation is physically present and the subject matter of the investigation permits an immediate notice and hearing that will be meaningful, the responsible

official will normally be able to listen to the subject's side of the story before the decision on exclusion without assuming any additional risk. Given the scope of the notice and hearing required by the court in this case, however, a meaningful pre-exclusion notice and reasonable preparation time before the hearing would have taken a significant period of time during which the risk perceived by Dean Reinstein would have continued. Due process, in my judgment, did not require assumption of that risk.

The second ground on which the court faults the Dean relates to the failure to give Herbert a post-exclusion notice and hearing regarding the basis for the exclusion. The court apparently regards such notice and hearing as distinguishable from the notice and hearing that was afforded on the June 14th charges. Unlike the court, I do not perceive a due process violation here. Where a fuller but prompt investigation results in a recasting of the formal charges and a prompt hearing is held on those formal charges, I do not believe due process requires that an institution go back and hold a hearing regarding the information available at the end of the preliminary investigation.

For these reasons, I would affirm the judgment of the district court.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 23, 1996 AND ENTERED AND FILED FEBRUARY 26, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT

V.

TEMPLE UNIVERSITY SCHOOL OF LAW, ROBERT REINSTEIN, DEAN, AND TEMPLE UNIVERSITY

Newcomer, J. February 23, 1996

MEMORANDUM

I. Background

In October 1994, this Court presided over a bench trial at which plaintiff Lincoln Herbert claimed that defendants Temple University, Temple University Law School, and Dean Robert Reinstein violated his constitutional rights by suspending him without due process.

The facts leading up to the suspension are as follows. On May 4, 1994, Dean Reinstein received reports that Lincoln Herbert had committed an attack inside the law school with pepper gas on the previous night. The incident resulted in the

hospitalization of one law school employee due to inhalation of the pepper gas. Dean Reinstein and Assistant Dean Adelaide Ferguson investigated the incident that day.

On the morning of May 5, 1994, Dean Reinstein summoned Herbert to his office in order to hear Herbert's side of the story. At that meeting, Herbert claimed that he used the pepper gas only to defend himself against the advances of a homeless man who had chased him inside the building with a knife. Later that afternoon, following subsequent investigations, Dean Reinstein called Herbert into his office and suspended him. Dean Reinstein based this decision partly on additional information that he possessed concerning previous altercations between Herbert and individuals affiliated with the law school. Dean Reinstein then suspended Herbert on the ground that Herbert posed a clear and present danger to the safety of the law school community.

Although Dean Reinstein suspended Herbert before the semester had ended, the Dean permitted Herbert to take his final examinations at home. Herbert did so and received the highest grades of his law school career. Dean Reinstein also referred the case to the law school's Disciplinary Committee, which scheduled a hearing for June 21, 1994. At Herbert's request, the hearing was continued three times and finally took place on October 3, 1994.

In September 1994, Herbert filed this case in this Court seeking a temporary restraining order ordering Dean Reinstein to lift the suspension. This Court denied the motion for a temporary restraining order. The Disciplinary Committee eventually voted to suspend Herbert from the law school until January 1997. The Committee also ordered psychotherapy and community service as prerequisites for Herbert's reenrolling in the law school.

Appendix C

a. This Court's Ruling Following the Bench Trial:

Herbert claimed that defendants violated his right to procedural due process under the Fourteenth Amendment.[1] He claimed that both Dean Reinstein's May 5, 1994 suspension and the Disciplinary Committee's October 1994 suspension violated his procedural due process rights.

This Court rejected Herbert's arguments. Following a bench trial, this Court found that Herbert received all process to which he was entitled under the Supreme Court's standard in *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (student must be provided with oral or written notice of charges against him and opportunity to deny and explain charges against him). This Court denied Herbert's request for injunctive relief. Herbert then appealed to the Third Circuit Court of Appeals.

b. The Third Circuit's Ruling After Appeal:

The Third Circuit affirmed this Court's denial of injunctive relief. The Third Circuit also affirmed this Court's finding that Herbert was provided with adequate due process at the Disciplinary Committee hearing.[2]

---

1. He also claimed violation of his First Amendment rights to free speech and free association. He did not raise these arguments at trial, and the Third Circuit held that he waived his right to argue these issues on appeal.

2. The Third Circuit's opinion is, in some respects, internally inconsistent. On the one hand, the court characterizes the Disciplinary Committee's proceedings as sufficient, stating as follows:

(Cont'd)

Appendix C

The Third Circuit reversed and remanded, however, on the ground that Herbert was deprived of procedural due process at the May 5, 1994 suspension in Dean Reinstein's office. The Third Circuit found that, because Dean Reinstein had relied on information regarding Herbert's involvement in other incidents at or near the law school without notifying Herbert, Herbert was not provided with an adequate opportunity, according to *Goss*, to explain those incidents. The Third Circuit remanded for entry of declaratory relief in favor of Herbert on this point and for determination of damages.

A damages hearing took place before this Court on February 20, 1996. Following are the findings of fact and

---

(Cont'd)

> [W]e conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he was not entitled to injunctive relief. Furthermore, the court should, in considering damages, take into account that Herbert ultimately was suspended in procedurally proper proceedings.

Opinion at 17-18. On the other hand, the Third Circuit suggested that defendants *never* gave Herbert notice of all of the reasons relied upon by Dean Reinstein:

> Neither the formal charges nor the panel hearing, however, explained to Herbert all the reasons why Dean Reinstein suspended him initially, pending the full investigation by the disciplinary counsel. . . Moreover, the formal charges and panel hearing were not what *Goss* requires. . . Furthermore, it is unclear that Herbert ever received notice of these other grounds for his initial suspension prior to the initiation of this civil suit.

Opinion at 16-17.

conclusions of law made after careful consideration of the testimony of the witnesses, the arguments of plaintiff and defense counsel, and the opinion of the Third Circuit dated October 6, 1995.[3]

II. Findings of Fact

1. Dean Reinstein suspended Herbert on May 5, 1994 after concluding that Herbert posed a clear and present danger to the safety of the law school community.

2. Dean Reinstein based this decision on his informed understanding of the May 3, 1994 incident concerning the pepper gas. Dean Reinstein also buttressed his decision with his knowledge of several prior incidents involving Lincoln Herbert.

3. The other incidents included an altercation between Mr. Herbert and the owner of a food truck parked daily outside the law school; an episode in which Mr. Herbert allegedly acted aggressively toward the eleven year old daughter of a Temple University student; and an incident of violence involving Mr. Herbert and the police at a Chinese restaurant located near the University.

---

3. Several days before the hearing, defense counsel submitted to this Court a trial brief outlining their position. At the hearing, Herbert asked this Court to permit him to present a brief outlining his own legal arguments. Herbert promised this Court, on the record, that he would file the brief by the morning of February 21, 1996. As of February 22, 1996, he still has not filed the brief, despite at least three telephone calls to Chambers promising that the brief was "on its way." Accordingly, this Court will proceed without the brief.

3. The Third Circuit has held that the Dean's failure to notify Herbert that the Dean was considering these other incidents constitutes a violation of Herbert's right to procedural due process.

4. Herbert has not denied that these incidents took place. Instead, the defense contends, and Herbert does not dispute, that Herbert discussed each of these incidents as they occurred with members of the Temple Law School administration, primarily Assistant Dean Adelaide Ferguson.

5. Herbert did not demonstrate that he would have denied those allegations on May 5, 1994 even if Dean Reinstein had informed Herbert that he was considering them.

6. Following the May 5, 1994 suspension, Herbert's reputation in the law school community suffered. Prior to the suspension, Herbert's reputation in the community was that of a sometimes rude and verbally aggressive, but not violent, person. Following the suspension, his reputation was that of an individual prone to a violent propensity on one or more occasions.

7. Herbert has not demonstrated, that Dean Reinstein or any agent of Temple University was responsible for the decline in Herbert's reputation. Specifically, Herbert has not demonstrated that any Temple University agent disclosed ("published") the circumstances surrounding Herbert's suspension to any person other than Herbert. Rather, Herbert himself described the suspension to various members of the law school student body. He also contacted several newspapers and periodicals, including the Philadelphia Inquirer, the Washington Times, the Montgomery County Observer, and the National Review magazine. Herbert's self-described purpose in contacting these

members of the press was to "tell [his] side of the story." In addition, Herbert distributed leaflets at the law school which lambasted the Temple Law School administration for his predicament. The leafletting took place on at least three occasions: graduation exercises in 1994 and 1995, and a law school open house.

8. Herbert contends that he suffered severe emotional distress. The evidence presented at the hearing demonstrates that his distress stemmed from the actual suspension, and not from the fact that Dean Reinstein failed to inform him that the Dean had considered the previous incidents.

III. Conclusions of Law

1. This Court is bound by the decisions of the Third Circuit Court of Appeals and, therefore, at its direction and contrary to this Court's findings, this Court will enter declaratory judgment in favor of Lincoln Herbert and against the defendants on Herbert's claim of a procedural due process violation stemming from the May 5, 1994 suspension.

2. The Dean's suspension order was amply supported and justified by the pepper gas incident alone. The Dean's investigation of the incident caused him to believe that Herbert had initiated an unprovoked attack using pepper gas in the law school. When the Dean asked Herbert to explain his side of the story, Herbert set forth his self-defense argument. Dean Reinstein disbelieved Herbert's story. The Disciplinary Committee also discredited Herbert's story; in October 1994, the Committee found that Herbert had lied to the Dean when he claimed that his actions were based on self-defense. Thus, the May 5, 1994 suspension was justified even without considering the previous incidents.

3. Despite Dean Reinstein's failure to notify Herbert on May 5, 1994 that the Dean had knowledge of the previous incidents, Herbert was aware of the Dean's knowledge. At the times that other incidents occurred, Herbert actually discussed those incidents with Dean Reinstein and/or Assistant Dean Ferguson.

4. Furthermore, Herbert has not demonstrated that he would have denied his involvement in the previous incidents even if Dean Reinstein had informed Herbert that he relied in part on those incidents in determining that Herbert posed a danger to the Law School community. First, at the hearing before this Court, Herbert did not deny that the additional incidents took place as described. Second, even if Herbert had formally rebutted those charges at the May 5, 1994 meeting, Dean Reinstein and/or Assistant Dean Ferguson had already heard Herbert's version of those incidents at the time that those incidents occurred.

5. No damages proximately flowed from Dean Reinstein's May 5, 1994 failure to notify Herbert of the fact that the Dean was considering the other incidents.

6. First, Herbert himself is responsible for any damage caused to his reputation. Herbert presented no evidence showing that Dean Reinstein notified any person about the circumstances of the suspension. Rather, Herbert embarked on a campaign to publicize the suspension and the reasons underlying the suspension.

7. Second, Herbert did not offer sufficient evidence demonstrating that any distress that he suffered was caused by the May 5, 1994 due process deprivation. Rather, the distress he described resulted from his ultimate suspension in October 1994. Where a deprivation is justified but procedures are

deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. *Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052 (1978) ("This ambiguity in causation . . . provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself."). Here, as in *Carey*, Herbert's claim for damages fails because Herbert did not set forth any injury stemming from the procedural due process violation itself.

5. Because Herbert has not shown that he has suffered any actual damages as a result of Dean Reinstein's reliance on the previous incidents, he is entitled to receive only nominal damages. *Carey*, 435 U.S. at 266.

6. Herbert is not entitled to punitive damages. Punitive damages may be awarded only upon a showing of "reckless and callous indifference." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Dean Reinstein's actions were in no way reckless or callously indifferent. In fact, the Third Circuit explicitly found to the contrary, noting that Dean Reinstein "clearly attempt[ed] to respect Herbert's rights." October 6, 1995 Opinion at 15.

7. Finally, this Court will deny Herbert's request for attorney's fees at this time. As this Court informed Herbert at the hearing, any petition for fees must be filed by his former attorney and must include legal authority to persuade this Court that Herbert is a "prevailing party" and thus is entitled to attorney's fees.

An appropriate Order follows.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT

V.

TEMPLE UNIVERSITY SCHOOL OF LAW, ROBERT REINSTEIN, DEAN, AND TEMPLE UNIVERSITY

ORDER

AND NOW, this 23rd day of February, 1996, after careful consideration of the testimony of the witnesses, the arguments of plaintiff and defense counsel, and the opinion of the Third Circuit dated October 6, 1995, it is hereby ORDERED as follows:

1. Declaratory judgment is entered IN FAVOR OF plaintiff Lincoln Herbert and AGAINST defendants to reflect the fact that the May 5, 1994 suspension of plaintiff violated his procedural due process rights.

2. Compensatory damages are awarded IN FAVOR OF plaintiff Lincoln Herbert and AGAINST defendants in the amount of one dollar ($1.00).

3. Plaintiff's request for punitive damages is DENIED.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. *96-1291*

Herbert v. Reinstein

To: Clerk

1) Motion by Appellant for Extension of Time to File Amended Brief and Appendix.

2) Motion by Appellees to dismiss appeal.

The foregoing motions at #1 and #2 having been considered, the within appeal is hereby dismissed pursuant to the order of the Court entered May 9, 1997. The prior, non-conforming brief cannot be treated as a brief properly filed pursuant to FRAP 28(g). The Clerk specifically notes appellant's failure to conform to established briefing schedules and prior directives of the Court.

For the Court,

s/ [illegible]
Clerk

Dated: MAY 30 1997

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 3, 1997

June 20, 1997
D-132

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *96-1291*

LINCOLN HERBERT, Appellant

v.

ROBERT J. REINSTEIN, et al.
(EDPA DC No. 94-cv-05765(CCN))

Present: GREENBERG and NYGAARD, *Circuit Judges*

1) Motion by appellant, pro se, Lincoln Herbert to set aside the Clerk's order Dismissing Appeal, which the Court may wish to construe as a motion to re-open the appeal at no. 96-1291.

s/ Lenore R. Benoit
Lenore R. Benoit 597-1092
Case Manager

Appendix E

ORDER

The foregoing motion is denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: JUL 03 1997

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 11, 1997

July 29, 1997
E-12

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *96-1291*

LINCOLN HERBERT, Appellant

v.

ROBERT J. REINSTEIN, et al.
(EDPA DC No. 94-cv-05765(CCN))

Present: GREENBERG, NYGAARD and ROTH, *Circuit Judges*

1) Motion by appellant, pro se, Lincoln Herbert for reconsideration of the Court's 7/3/97 order denying appellant's motion to set aside the Clerk's order Dismissing Appeal, which was construed as a motion to re-open the appeal at no. 96-1291.

s/ Lenore R. Benoit
Lenore R. Benoit 597-1092
Case Manager

See D-132 attached.

Appendix F

ORDER

The foregoing motion is denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: AUG 11 1997

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED FEBRUARY 7, 1997 AND ENTERED FEBRUARY 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 97-0457

LINCOLN HERBERT

v.

ROBERT J. REINSTEIN, et al.

ORDER

AND NOW, this 7th day of February, 1997, in accordance with Local Civil Rule 40.1(b)(3)(A), it is hereby

ORDERED that the above-captioned case is reassigned from the calendar of the Honorable Ronald L. Buckwalter, to the calendar of the Honorable Clarence C. Newcomer as related to Civil Action No. 94-5765.

FOR THE COURT:

EDWARD N. CAHN
Chief Judge

ATTEST:

s/ Michael E. Kunz
MICHAEL E. KUNZ
Clerk of Court

Supreme Court, U.S.
FILED
FEB 9 1999
CLERK

No. 98-985

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

LINCOLN HERBERT

Petitioner

v.

**ROBERT J. REINSTEIN, DEAN
TEMPLE UNIVERSITY SCHOOL OF LAW
AND VICE PRESIDENT OF TEMPLE UNIVERSITY;
TEMPLE UNIVERSITY SCHOOL OF LAW;
&
TEMPLE UNIVERSITY**

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD P. MYERS
(Counsel of Record)
PAUL, REICH & MYERS
1608 Walnut St., Ste. 500
Philadelphia, PA 19103
(215) 735-9200

GLENN J. BROWN
PALISSERY & BROWN
246 West Broad St.
Quakertown, PA 18951
(215) 529-0920

MARTIN E. WOLF
Lindill Bldg., Ste. 100
104 Victory Lane
Bel Air, MD 21014
(410) 893-3500

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY TO TEMPLE'S REASONS FOR DENYING THE WRIT 1

1. Mr. Herbert's First Case against Temple Did Not, and Could Not, Challenge Temple's Ultimate Disciplinary Punishments. 1

2. Temple's Argument Demonstrates that the Circuits Are Split When Applying *Ricks*. 5

CONCLUSION 9

TABLE OF AUTHORITIES

Delaware State College v. Ricks,
449 U.S. 250 (1980) 5, 6, 7, 8

Fobbs v. Holy Cross Health System Corp.,
29 F.3d 1439 (9th Cir. 1994),
cert. den., 513 U.S. 1127 (1995) 8, 9

Lever v. Northwestern University,
979 F.2d 552 (7th Cir. 1992),
cert. den., 508 U.S. 951 (1993) 6, 7

INTRODUCTION

Petitioner Lincoln Herbert, pursuant to Rule 15.5 of the Rules of this Court, submits this Reply Brief to address certain arguments which Respondents (hereafter, "Temple") raised in their Brief in Opposition to Mr. Herbert's Petition for Writ of Certiorari.

REPLY TO TEMPLE'S REASONS FOR DENYING THE WRIT

1.

Mr. Herbert's First Case against Temple Did Not, and Could Not, Challenge Temple's Ultimate Disciplinary Punishments.

Temple argued that Mr. Herbert misrepresented the procedural history of this case by not fully discussing his first lawsuit against Temple (hereafter, "*Herbert I*"). Temple's Brief in Opposition at 1. This charge is false. Temple intimates that Mr. Herbert had a "full and fair opportunity" in October, 1994 to litigate Temple's ultimate punishment decision of January, 1995.

A fuller discussion of *Herbert I* beyond that found in the Petition at 5, n.1, was not relevant to the present appeal. *Herbert I* was filed in September, 1994, and challenged only the Dean's May, 1994 summary suspension. It did not, and could not, challenge Temple Law School's later 2-½ year suspension and other punishments, which did not occur until after the complaint was filed. Temple's formal disciplinary

proceedings began in October, 1994 and concluded in January, 1995.

The main reason for the confusion in this case is the District Court's insistence that the matter go forward at a time when Temple's formal disciplinary process was incomplete. The District Court recognized that the process was not final, and restricted the scope of the hearing accordingly:

> MR. RESTIFO [Counsel for Lincoln Herbert]: Your Honor, if I might say this. The process being undertaken by the law school which is the subject really of this action, is still going on. And I don't think that --
>
> THE COURT: This of course will not touch the merits of what the law school may or may not determine is appropriate to do. . .

Appendix J at 61a.[1] (JA 788)

Thus, neither the formal disciplinary hearing nor the sanctions imposed were issues in *Herbert I*, and Mr. Herbert did not have a "full and fair opportunity" to litigate those issues.

---

[1] In order to clarify reference to his Appendices, Mr. Herbert has referred to the exhibits in this Reply with letters and pagination sequential to the exhibits included as Appendices to the original Petition.

Had the District Court merely deferred a final hearing on the matter from October 13, 1994 until the disciplinary proceedings had been finalized in January, 1995, the confusing procedural issues regarding the statute of limitations and collateral estoppel would not have arisen. At any time after January 18, 1995 the District Court could have, and should have, directed Mr. Herbert to file an amended complaint addressing all of his claims for relief relating both to his initial suspension and to the disciplinary proceedings and the ultimate punishments imposed.

Temple's assertion that Mr. Herbert was allowed to fully and fairly litigate this case in October 1994 (Temple's Brief in Opposition at 2) is false. Temple confuses the receipt of some evidence of what happened during the formal disciplinary hearing with a full and fair review of those proceedings by the court, which never occurred. The official record of Temple's formal disciplinary hearings was the videotapes, which the District Court expressly deemed irrelevant to Mr. Herbert's first complaint, and which it refused to consider.

> MR. RESTIFO: Mr. Hittinger had said a number of times when I've questioned him about what happened, Mr. Hittinger said that there is a videotape available which shows what happened.
>
> Can we stipulate, Mr. Hittinger, that we can simply play it as an accurate representation of what went on?
>
> THE COURT: Well, how long is that?
>
> MR. RESTIFO: Well, if we don't play the whole thing, it's about six hours long, but certain portions.

> MR. HITTINGER [Counsel for Temple]: Well, your Honor--
>
> THE COURT: Well, I can't see how I can listen to that, and I can't see how it would be relevant for me to do so. I've heard your complaints, the plaintiff's complaints as to the denial of due process.
>
> I have heard the rationale, his explanations, and I'll hear also from the defense. I don't think that I should sit in judgment on the conduct of the proceedings themselves, and therefore I'm going to deny if you're making an offer to show that video, I'm going to deny it for that purpose.

Appendix K at 63a. (JA 356-357)

Similarly, Temple's assertion that Mr. Herbert "had a full and fair opportunity to raise [the psychiatric punishment] issue in his first lawsuit" during the remand hearing of February, 1996 (Temple's Brief in Opposition at 13) is utterly belied by the record of that proceeding. The scope of the remand hearing on damages did not go beyond the May, 1994 summary suspension by the Dean. At the suggestion of Temple's counsel, however, the District Court limited the scope of the remand hearing solely to Dean Reinstein's failure on May 5, 1994 to disclose all of his supposed reasons for summarily suspending Mr. Herbert:

> MR. HITTINGER: Yes. But if I might, your Honor, just one minute. I see the only issue before this Court that the Third Circuit has ruled that Dean Reinstein violated Mr.

> Herbert's civil rights because, and only because, on May 5th, he did not tell Mr. Herbert all the reasons why he suspending [sic] him, primarily about prior acts that Mr. Herbert had committed.
>
> And it's only that constitutional violation which the Third Circuit said he would be entitled to some damages, probably just nominal damages, and that's the only violation they found.
>
> THE COURT: Well, I think you're right. It was very narrow, and I'll ask the witness to try to stay within those narrow parameters. . . .

Appendix L at 64a. (JA 621).

Psychiatric punishment was not a part of Mr. Herbert's summary suspension, and was, therefore, not an issue at the remand hearing on damages.

2.

Temple's Argument Demonstrates

that the Circuits Are Split When Applying *Ricks*.

For the first time in the long course of this case, Temple now acknowledges that in order to start the statute of limitations in civil rights cases challenging administrative decisions, this Court's opinion in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), requires both a final decision and notice to the plaintiff. Temple's Brief at 8. A careful review of the various decisions in the circuits demonstrates that some

circuits have misinterpreted this Court's requirement in *Ricks* that the alleged discriminatory act must be final. This misinterpretation has led to the circuit split.

A comparison of the Third Circuit's decision in this case (hereafter, *"Herbert II"*) with the Seventh Circuit's decision in *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. den.*, 508 U.S. 951 (1993), exemplifies the wider split among the circuits discussed more fully in Mr. Herbert's Petition. The Seventh Circuit analyzes at great length both the finality of the alleged discriminatory act and when notice of the discriminatory decision was given to the plaintiff.

In *Lever*, a professor was denied tenure and attempted to file a discrimination complaint with the Equal Employment Opportunities Commission ("EEOC"), alleging that the discriminatory act was the denial of tenure. After trial, the District Court held that the EEOC complaint was untimely because the tenure denial, which was the alleged discriminatory act, occurred when a university dean recommended that Professor Lever not be tenured. Professor Lever contended that the denial of tenure did not occur until the Dean's "recommendation" was made final by the university's provost. If the dean's recommendation was the final decision, then the EEOC complaint was untimely. If, however, the provost's decision was the "final" one, then the EEOC complaint was timely. *Id.*, 979 F.2d at 553.

The Seventh Circuit began its analysis with the discriminatory act. *Id.* at 554. The question before the Court was when the final decision to deny tenure had actually occurred. After reviewing the entire record, the *Lever* District Court determined that the dean's letter had been the university's final decision to deny tenure. The Seventh

Circuit, applying the clearly erroneous standard of review, could not reverse on the factual record before it. *Id.* at 557.

The critical issue which the Seventh Circuit addressed in *Lever* went unaddressed by the Third Circuit in *Herbert II*, i.e., precise identification of the discriminatory act(s) alleged. Once the discriminatory act is identified, in accordance with this Court's opinion in *Ricks*, the analyzing court must then determine when the decision that is alleged to be the discriminatory act became a final decision, rather than a mere recommendation, or an expression of some future intention to act. This was the analysis which the Seventh Circuit performed in *Lever*, but which the Third Circuit failed to perform in *Herbert II*.

In *Ricks*, moreover, this Court distinguished, for limitations purposes, between direct review and collateral review (such as grievance proceedings). *Ricks* defined direct review as "an opportunity to influence a decision before it is made." 449 U.S. at 261. The amended complaint in *Herbert II* identified Temple's ultimate administrative decision as the act which violated his civil rights. Because Mr. Herbert had a chance to influence the administrative decision before it became final, the statute of limitations should not have been triggered.

Contrary to the approach in *Lever*, the Third Circuit in *Herbert II* did not discuss whether the October 17, 1994 announcement to impose sanctions was a final decision. Indeed, in its entire memorandum opinion, the Third Circuit did not mention the word "finality." It is plain from its memorandum opinion that the Third Circuit did not consider finality to be a relevant consideration in *Herbert II*, even though Mr. Herbert utilized Temple's direct review procedures to change the punishments recommended by the Discipline Committee. In fact, two of the punishments

announced on October 17, 1994 were never finalized by the direct review process and, therefore, were never imposed.[2]

The October 17, 1994 announcement by the Discipline Committee was not a final decision, and could not be final, under Temple's Code. Sections VI.D(7)(c) and (d) of Temple's Code expressly state (Appendix F at 46a):

> (c) If the sanction imposed by the Committee and upheld by the Panel or imposed by the Panel is either suspension or permanent expulsion of the Student, the sanction shall be automatically reviewed by the Plenary Faculty.
>
> (d) Otherwise, the Panel's determination shall be final and the Dean shall thereafter carry out that determination.

There is no ambiguity that if the recommended sanction is suspension, which it was in this case, the sanction must be reviewed by the Plenary Faculty before it becomes final. Despite Temple's incorrect statement to the contrary, this review would have been mandatory regardless of whether or not Mr. Herbert had pursued his administrative review. Temple's concession that *Ricks* requires both finality and notice makes the statute of limitations decision in *Herbert II* that much more questionable.[3]

---

[2] The Law School Review Panel vacated the Discipline Committee's 100-hour psychological counseling punishment. Appendix E, 51a-54a. Later, the Plenary Faculty vacated the community service punishment.

[3] Temple cites *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439 (9th Cir. 1994), *cert. den.*, 513 U.S. 1127 (1995), a case which reinforces the need to analyze the

Because there is a clear split in the circuits on the need for finality when challenging administrative decisions, this Court should grant certiorari.

CONCLUSION

For the reasons stated in this Reply and in the initial Petition, the Petition for Writ of Certiorari should issue.

Respectfully submitted,

PAUL, REICH & MYERS, P.C.

By: _____
RICHARD P. MYERS

---

precise discriminatory act before applying the *Ricks* principle regarding notice. In *Fobbs*, a doctor claimed that the discriminatory act was his summary suspension. 29 F.3d 1443-1444. By definition, a summary suspension is final when it occurs. *Herbert II* has nothing to do with a summary suspension; rather, *Herbert II* challenges a formal disciplinary proceeding under an administrative code which defined finality, and required finality, before punishment could be imposed.

INDEX TO APPENDICES

Appendix J, Excerpts from Transcript of Hearing of October 13, 1994 . . . . . 61a

Appendix K, Excerpt from Transcript of Hearing of October 18, 1994 . . . . . 63a

Appendix L, Excerpt from Transcript of Remand Hearing of February 20, 1996 . . . . . 64a

APPENDIX J

Excerpts from Transcript of Hearing of October 13, 1994

THE COURT [Judge Clarence C. Newcomer]: My law clerk has just handed me a copy of my Order dated September 21, 1994, and I'll read it, and this has been docketed in this case.

"Now, this 21st day of September 1994, upon consideration of the plaintiff's motion for a Temporary Restraining Order, it's hereby ordered that said motion is denied. All parties are hereby ordered to appear before this Court on Friday, September 30, 1994, of which this is a continued hearing, at 9:00 a.m. for a full and final hearing on the merit of this case, and it is so ordered." That's docketed in the Clerk's Office, and has been.

(JA 787)

. . .

MR. RESTIFO [Counsel for Lincoln Herbert]: Your Honor, if I might say this. The process being undertaken by the law school which is the subject really of this action, is still going on. And I don't think that --

THE COURT: This of course will not touch the merits of what the law school may or may not determine is appropriate to do. This has to do with whether or not this plaintiff was afforded his civil rights, his due process rights specifically. Well, proceed.

(JA 788)

. . .

MR. HITTINGER [Counsel for all of the defendants]: The Complaint in this case was filed on September 21st. In that Complaint which your Honor has, I don't see any mention whatsoever of -- obviously it couldn't be -- of the

October 3rd and October 10th hearings. I don't see any mention at all of the argument Mr. Restifo is making that the charges weren't specific enough, and that they were vague and ambiguous. This is not in the Complaint at all.

I'm afraid this case is being evolved as we go along, and that puts us at a severe disadvantage. What I'm requesting your Honor rule on is that the Complaint as written bind this case in these proceedings, and we'll defend it on that. But not allow Mr. Restifo to get in evidence that's beyond the Complaint, particularly evidence that's beyond the date of the Complaint.

(Pause in proceedings.)

MR. HITTINGER: Your Honor, if I could outline our argument --

THE COURT: Yes, sir.

MR. HITTINGER: -- as we'll present it. With all due respect to Mr. Restifo, these proceedings are really quite simplistic [sic]. There's really two issues before this Court, and only two issues based on this Complaint.

The first issue was -- is was [sic] Mr. Herbert provided all due process due to him under the circumstances prior to his suspension from law school by Dean Reinstein on May 5. That's a legal issue, it's a factual issue.

The second issue before your Honor is was [sic] Mr. Herbert suspended by Dean Reinstein because of his political beliefs and activities? . . . .

(JA 812-813)

APPENDIX K

Excerpt from Transcript of Hearing of October 18, 1994

MR. RESTIFO: Mr. Hittinger had said a number of times when I've questioned him about what happened, Mr. Hittinger said that there is a videotape available which shows what happened.

Can we stipulate, Mr. Hittinger, that we can simply play it as an accurate representation of what went on?

THE COURT: Well, how long is that?

MR. RESTIFO: Well, if we don't play the whole thing, it's about six hours long, but certain portions.

MR. HITTINGER: Well, your Honor --

THE COURT: Well, I can't see how I can listen to that, and I can't see how it would be relevant for me to do so. I've heard your complaints, the plaintiff's complaints as to the denial of due process.

I have heard the rationale, his explanations, and I'll hear also from the defense. I don't think that I should sit in judgment on the conduct of the proceedings themselves, and therefore I'm going to deny if you're making an offer to show that video, I'm going to deny it for that purpose.

(JA 356-357)

APPENDIX L

Excerpt from Transcript of Remand Hearing of February 20, 1996

MR. HITTINGER: Yes. But if I might, your Honor, just one minute. I see the only issue before this Court that the Third Circuit has ruled that Dean Reinstein violated Mr. Herbert's civil rights because, and only because, on May 5th, he did not tell Mr. herbert all the reasons why he suspending [sic] him, primarily about prior acts that Mr. Herbert had committed.

And it's only that constitutional violation which the Third Circuit said he would be entitled to some damages, probably just nominal damages, and that's the only violation they found.

THE COURT: Well, I think you're right. It was very narrow, and I'll ask the witness to try to stay within those narrow parameters. . . .

(JA 621)